(1)

No. 91-1232

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1991

CYNTHIA M. NORMAN,
Executrix of the Estate of
Bruce E. Norman, Deceased,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a VIRGINIA POWER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. In this ERISA disability case, did the Court of Appeals err in failing to reverse the District Court grant of summary judgment once the Court of Appeals adjudicated (A) that there were conflicts of interest on the part of the two physician members of the Respondent's Disability Benefits Committee (hereafter called the DBC or Committee).

2. Is the decision of Respondent's Disability Benefits Committee denying ERISA disability benefits to Petitioner a denial to Petitioner of an impartial hearing due to the conflicts of interest of the two physician members of the Committee constituting an abuse of discretion by that Committee.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 3

CONCISE STATEMENT OF FACTS 4

BASIS OF FEDERAL JURISDICTION IN THE U.S. DISTRICT COURT 8

ARGUMENT 9

REASONS FOR GRANTING THE WRIT . . 16

CONCLUSION 17

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Case	Page
Firestone Tire and Rubber Company v. Bruch, 489 U.S. 101, 103 L.Ed.2d 80, 81 S. Ct. 948 (1989)	10

Statutes

Title 29 U.S.C. 1001 et seq . .	3, 8
Title 29 U.S.C. 1132(c)(1)(B) .	3, 8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CYNTHIA M. NORMAN,
Executrix of the Estate of
Bruce E. Norman, Deceased,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a Virginia Power,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Cynthia M. Norman, Executrix of the Estate of Bruce E. Norman, Deceased (hereafter petitioner), respectfully requests that this Court issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered August 19, 1991, in an unpublished Opinion.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is unpublished and is reprinted as Appendix B hereto at 1B. The Court's judgment was entered on August 19, 1991.

The December 6, 1990, District Court decision is printed and attached as Appendix C hereto at 1C.

(For background, the September 23, 1988 first District Court decision is printed and attached as Appendix D hereto at 1D, although this decision was not appealed.)

JURISDICTION

Petition for writ of certiorari to the U. S. Court of Appeals for the Fourth Circuit, which was decided by that Court on August 19, 1991 and which denied the petitioner's motion

to re-hear and suggestion for re-hearing in banc on October 22, 1991.

This petition is filed in accordance with Title 28 U.S. Code Section 2101, and United States Supreme Court Rules 13 and 14.

STATUTE INVOLVED

Original Complaint is brought under the Employee Retirement Security Act (ERISA), Title 29 U.S.C., Sections 1001, et seq., and especially Section 1132(a)(1)(B) which states:

> (a) Persons empowered to bring a civil action. A civil action may be brought--
>
> (1) by a participant or beneficiary--
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to

clarify his rights to future benefits under the terms of the plan.

CONCISE STATEMENT OF FACTS

In 1981, while at work petitioner Norman, a 16 year veteran boiler tender employee, was whacked in the back of the neck and head by a steam hose which separated, knocking him a great distance. (Appendix 1 and 2N). From that point, the following symptoms ensued and they never abated. See Bruce Norman's affidavit for his recital of events. (Appendix 1N and 2N).

Norman's symptoms, which included severe headaches, "locust" or buzzing sound in his head, hyperacusia, left side numbness, nausea and vomiting (Appendix 2 and 3N).

He was consigned to a noiseless environment by his physicians

(Appendix 4N), and this intolerance of sound never abated. (Appendix 4 and 12N).

When the physicians could find no physical or organic cause for these disabling symptoms, his symptoms were characterized as "psychiatric", to the distress of Norman himself.

From then on, the psychiatrists deduced initially traumatic neurosis (Appendix 9C) to an eventual neurosis or character disorder (Appendix 4B).

Dr. Kay, a board-certified psychiatrist (Appendix 1J) referred Norman to Dr. John Grant, a board-certified neurosurgeon (Appendix 1H), who, with the benefit of a history of seven years (Appendix 5F) diagnosed Norman as having a disabling brain stem cerebellum injury. (Appendix 1F, 7F, and 10F; 15G-25G)

Rather than accept the diagnosis, the DBC relied upon its own medical members, Dr. Slagel and Dr. Dingledine, (Appendix 18C and 19C) to discount the finding on the dual theories that (a) he didn't contract this while employed at Vepco (b) Dr. Grant's diagnosis was in error (c) the MRI performed on Norman was normal. (Appendix 3K-8K)

Yet the undeniable facts exist that Norman could not work any longer as a boiler operator, was consigned and never removed from this so-called "noiseless environment" in a selective duty job, his symptoms plagued him throughout and his discharge from Vepco ostensibly due to his "poor performance" as a clerk, according to the Decision of the U. S. District Court, "is related either to Norman's physical and/or mental condition which

has existed essentially since the date of the accident on July 8, 1981," (Appendix 10C).

Finally, in 1988, the above-mentioned neurosurgeon, Dr. John Grant, was able to tell Norman what was wrong with him. A portion of Dr. Grant's verbalization of Norman's condition is set out in Appendix 1G, et seq. and should be read.

Norman had lived since 1981 with the doctors and VEPCO telling nim he had a psychiatric disorder, that his condition was mentally inspired. Now he knew he had, in 1981 (a) suffered a brain stem cerebellum injury and (b) the nerve-damage injury was incurable. (Appendix 4F-6F and 11F-13F).

The medical evidence until 1986 (when Dr. Kay became his psychiatrist) and 1988 (when Dr. John Grant, a neurosurgeon, examined him) did not

have a firm diagnosis, other than what was termed a "character disorder". (Appendix 4B).

It is salient that a Social Security Administrative Law Judge determined Norman to be totally disabled, despite the lack of an etiology (the Social Security Administrative Law Judge decision came in 1987) (Appendix 1M, et seq.), well before the Dr. John Grant brain stem diagnosis was made in 1988.) See Appendix 1F, 7F, 10F; 1G, et seq.).

BASIS OF FEDERAL JURISDICTION IN THE U.S. DISTRICT COURT

Jurisdiction of the Complaint in U. S. District Court is founded upon the Employee Retirement Income Security Act of 1974, as amended (ERISA), Title 29 U.S.C. Section 1001,

et seq. and especially Section 1132(c)(1)(B).

Appeal was taken to the U.S. Court of Appeals for the Fourth Circuit, and this Petition for Writ of Certiorari follows:

ARGUMENT

The Supreme Court should, because of its supervisory role, establish once and for all time that its lower courts serve as (a) oversight tribunals that (b) actively redress abuses perpetrated by employers upon its employees seeking ERISA disability benefits under employer benefit plans. Otherwise, the Disability Benefit Committees of these corporations will continue to appear as unchecked kangaroo committees, composed of employer biased, tainted members and cloaked with the protective

discretionary abuse standard created by the Supreme Court, (referred to herein as the Bruch standard). Firestone Tire and Rubber Company v. Bruch , 489 U.S. 101, 103 L.Ed.2d 80, 81 S. Ct. 948 (1989).

Bruce Norman was a 16 year veteran boiler tender employee of VEPCO (Appendix 4C) who, while working on his job at VEPCO, was struck violently on the back of his neck by a separating steam hose and never recovered. The final diagnosis was that this accident caused brain stem cerebellum nerve damage. Despite this sobering diagnosis, the VEPCO Disability Benefits Committee (hereinafter DBC or Committee) refused to accept the diagnosis due to a palpable bias and conflict of interest

of the two medical members of the Committee, as stated in the Fourth Circuit Opinion (Appendix 13B-14B).

In that opinion, the Court held:

> It appears that VEPCO has treated this case in a rather high-handed manner, and Dr. Slagel and the DBC probably dismissed Drs. Grant and Kay's analysis too easily. Also, Dr. Dingledine and, most likely, Dr. Slagel, did have conflicts of interest and in no way could they be said to be totally impartial advisors.
>
> Appendix 13B-14B.

Why then did the Fourth Circuit Court of Appeals not reverse and order a de novo hearing by the District Court? Especially since the Fourth Circuit realized that the District Court had intimated in its earlier decision that:

> While mentioning that it was concerned by Dr. Slagel's possible conflict of interest, and also hinting

> that the result might have been different were the standard of review de novo, the Court nevertheless found for VEPCO because it could not find that the company's actions were an abuse of discretion. (Appendix 13B-14B; see also 29C).

The answer to the above question is where both the U.S. District Court and the Fourth Circuit Court went astray. Both Courts believed they were hamstrung by the Bruch standard of review. They were wrong and the Supreme Court should reverse. The Fourth Circuit declared conflict of interest of the DBC medical members (who decided the fate of Norman's disability claim), such creates an abuse of discretion under Bruch and forces a District Court de novo hearing. The petitioner was entitled to an impartial hearing before the appellee's Disability Benefits Committee upon his disability claim.

He did not get it due to the hopeless conflict of interest of the voting medical members, Dr. Slagel and Dr. Dingledine, upon whose opinions the DBC relied.

The result: the Petitioner had no chance. Essentially, the Petitioner was playing on Respondent's uneven playing field, hopelessly canted toward the appellee. Norman could not win.

If the Committee members were in a hopeless conflict of interest, then the resulting DBC decision is tainted, the Committee has engaged in an abuse of its discretion (the Bruch standard of review) and petitioner is entitled to a de novo hearing by the U.S. District Court.

The Fourth Circuit Court may have been misled by the Bruch-worded treatment of conflict of interest:

> Of Course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion. Firestone Tire and Rubber Company v. Bruch, 489 U.S. 101, 103 L.Ed.2d 80, at p. 95, 81 S. Ct. 948 (1989).

Here, the conflict of interest is not a factor, it is the factor. It should have been recognized as the significant and controlling factor.

After all, in Bruch, the U. S. Supreme Court dealt with a Plan interpretation. (Bruch, supra, 103 L. ed. at p. 91.) In the instant case, we deal with a facts determination, i.e., whether petitioner was permanent disabled by a brain stem cerebellum injury. (Appendix 1K).

What is the Disability Benefits Committee conflict of interest that the Fourth Circuit has acknowledged?

Dr. Slagel made what I expect the Court to conclude are factually unreasonable findings and conclusions to discount the medical brain stem cerebellum injury diagnosis of the neurologist, Dr. Grant. What makes the reliance upon Dr. Slagel's review (apart from the unreasonableness of his factual findings) so astounding is:

Dr. Slagel, an emergency room physician, was a VOTING MEMBER of Vepco's Disability Benefits Committee, as well as the expert reviewer of the medical evidence upon which the DBC quoted from and relied, which presents a hopeless CONFLICT OF INTEREST; the expert reviewer wears two hats - (1) he reviews the medical evidence for

the DBC and (2) then participates in the DBC deliberations and votes as a member of the DBC upon his own review. The DBC would have to vote against the review and medical opinion of its own committee members, who also have a vote.

REASONS FOR GRANTING THE WRIT

1. These ERISA plan disability hearings before employer-created committees are swathed in the protection afforded by the "abuse of discretion" Bruch standard. This Court should adjudicate that the members of these decision-making committees must be free of partiality. Otherwise, these decision-making committees are kangaroo courts and the purpose of ERISA to protect the employee is erased with this Court's blessing. This Court should say

unequivocally that the Bruch standard will not tolerate a conflict of interest that demonstrates active partiality.

CONCLUSION

Norman's executrix is entitled by the Bruch standard to a hearing on a level playing field, a reversal and a de novo hearing before the District Court Judge. The Supreme Court, in its supervisory role, should make clear that the Bruch standard requires that the ERISA Plan Committee must be free of conflict of interest and bias so that its fact-finding can be accomplished with impartiality to the employees who come before it.

For the reasons set forth above, the Writ should be granted.

Respectfully submitted,

CYNTHIA M. NORMAN,
Executrix of the Estate
of Bruce E. Norman,
Deceased,

By _____
Of Counsel

Albert C. Selkin, Esquire
WHITE AND SELKIN
Norfolk Commerce Center III
5425 Robin Hood Road, Suite 200
Norfolk, Virginia 23513
(804) 853-9386

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Petition for a Writ of Certiorari to Donald L. Creach, Esquire, and Patricia K. Epps, Esquire, HUNTON & WILLIAMS, 707 East Main Street, Richmond, Virginia 23219, pursuant to the requirements of Rules 29, 33, and 39 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to Respondent as set forth above, on or before January 17, 1992. I further certify that I am a member of this Court, and that all parties required to be served have been served on or before January 17, 1992.

Albert C. Selkin
Of Counsel for Petitioner

A P P E N D I X

APPENDIX INDEX

SUBJECT	PAGE
1. Order on Petition for Rehearing with Suggestion for Rehearing In Banc of United States Court of Appeals for the Fourth Circuit, filed October 22, 1991, in case of Cynthia M. Norman, Executrix of the Estate of Bruce E. Norman v. Virginia Electric and Power Company, d/b/a Virginia Power Company, No. 91-2006	1A
2. Unpublished Opinion of Judges Russell, Staker and Kaufman of the U. S. Court of Appeals for the Fourth Circuit, decided August 19, 1991, in case of Cynthia M. Norman, Executrix of the Estate of Bruce E. Norman v. Virginia Electric and Power Company, d/b/a Virginia Power Company . .	1B
3. Memorandum and Order of Senior United States District Judge Walter E. Hoffman of the United States District Court for the Eastern District of Virginia, Norfolk Division, dated December 6, 1990, in case of Cynthia M. Norman, Executrix of the Estate of Bruce E. Norman, Deceased v. Virginia Electric and Power Company, d/b/a Virginia Power	1C

4. Memorandum Opinion of Senior United States District Judge Walter E. Hoffman of the United States District Court for the Eastern District of Virginia, Norfolk Division, dated September 23, 1988, in case of Bruce E. Norman v. Virginia Electric and Power Company, d/b/a Virginia Power 1D

5. Complaint of Bruce E. Norman v. Virginia Electric and Power Company filed March 12, 1990 . . 1E

6. Dr. John L. Grant's medical reports of 03/11/88 . . . . . 1F
04/01/88 and 7F
06/27/88 . . . . . 10F

7. Deposition of Dr. John L. Grant, Neurosurgeon of 07/14/88 (pages 30-47) 1G

8. Expert Credentials of John L. Grant, M.D. 1H

9. Dr. E. Daniel Kay's medical reports of 10/01/86 . . . . . 1I
01/12/87 and 3I
05/25/88 . . . . . 11I

10. Expert Credentials of Dr. E. Daniel Kay, Jr. 1J

11. Decision of Disability Benefit Committee of Virginia Power dated 03/30/89 . . . . . 1K

12. Decision of Administrative Benefit Committee of Virginia Power dated 07/10/89 . . . . . 1L

13. Social Security Administration Decision, dated 09/28/87 . . . . 1M

14. Affidavait of Bruce E. Norman dated 08/11/88 . . . . . 1N

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 22, 1991

No. 91-2006

CYNTHIA M. NORMAN, Executrix of the Estate of Bruce E. Norman,

Plaintiff - Appellant

v.

VIRGINIA ELECTRIC POWER COMPANY, d/b/a Virginia Power Company,

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing in Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Staker and Judge Kaufman.

For the Court,

/s/ John M. Greacen
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CYNTHIA M. NORMAN, Executrix of the Estate of Bruce E. Norman,

Plaintiff-Appellant,

v.

No. 91-2006

VIRGINIA ELECTRIC POWER COMPANY, d/b/a Virginia Power Company,

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk
Walter E. Hoffman, Senior District Judge.
(CA-90-1121-N)

Argued: May 8, 1991

Decided: August 19, 1991

Before **RUSSELL**, Circuit Judge, **STAKER**, United States District Judge for the Southern District of West Virginia, sitting by designation, and **KAUFMAN**, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Albert C. Selkin, WHITE AND SELKIN, Norfolk, Virginia, for Appellant, Donald Lester Creach, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee. **ON BRIEF:** Patricia K. Epps, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Plaintiff Cynthia M. Norman is the widow and executrix of the estate of Bruce Edward Norman ("Norman"). Norman was a long-time employee of Defendant Virginia Electric and Power Company ("VEPCO"), who, while at work in 1981, suffered an injury to his neck. After this injury, Norman's work performance so deteriorated that he was fired in 1985. The next year, Norman applied to his former employer

for total and permanent disability benefits, but this request was denied by VEPCO. Norman then appealed this denial to federal district court, and the Court, finding no abuse of discretion present, affirmed the employer's decision. Also being unable to find an abuse of discretion, we likewise affirm.

On July 8, 1981, while employed as a boiler operator at VEPCO;s Portsmouth Power Station, Norman was struck on the back of his neck by a pressure air hose, which had separated from an air lance. After this injury, Norman complained of severe unabating headaches, a constant "locust" sound in both ears, complete inability to tolerate any type of noise, left side numbness, and increased headache, nausea, and vomiting after exerting effort of any kind.

Between July 1982 and December 1982, Norman was examined by numerous physicians, including a neurologist, neurosurgeon, otolaryngologist, and psychiatrist. None of these doctors could find any physical cause for Norman's complaints, and several of them attributed his neurosis to a "character disorder." This was also the conclusion of Dr. Frederick Woodson, a psychiatrist who saw Norman every other week between January 1983 and September 1985.

Because of Norman's claimed sensitivity to noise, several doctors suggested that he be assigned to work in a low-noise environment. Thus, in November 1982, VEPCO assigned Norman to perform clerical duties in the power station's administrative office. Before this, Norman had worked only one day since his accident, claiming

that the noise in the boiler room was disabling. While Norman's clerical work was initially acceptable, this supposedly changed around June of 1984 when his position was formally changed to "clerk" and he began receiving a lower rate of pay. Norman's work so deteriorated that on September 16, 1985, he was terminated for "poor performance".

At some point, Norman hired an attorney to attempt to receive disability retirement benefits from VEPCO. The company's plan, The Dominion Resources, Inc, Retirement Plan, provides for disability benefits for those who are: (a) eligible by age or years of service; (b) totally disabled; (c) permanently disabled; (d) due to a bodily injury or disease; (e) while employed by VEPCO. There is no question that Norman met the age or

years of service requirement, but the question remains whether, while employed by VEPCO, he was totally and permanently disabled due to a bodily injury -- specifically, that suffered in the July 8, 1981 accident.

Prior to Norman's termination at VEPCO, no doctor had declared him totally and permanently disabled because of the accident. In March, 1988, though, Norman's then psychiatrist, Dr. E. Daniel Kay, referred him to Dr. John Grant, a board-certified neurosurgeon, who concluded that Norman's 1981 accident caused brain stem cerebellum damage, which resulted in permanent disability. Dr. Grant found that Norman's condition was deteriorating, and at this time the doctor took note of his patient's slow mentation, indistinct speech, and mildly wide-

based gait. Dr. Kay adopted Dr. Grant's findings.

On August 15, 1986, before Dr. Grant's analysis but after Norman had been fired, Norman's attorney contacted VEPCO and asked that the company send him claim forms, so that a claim could be filed for Norman to receive total and permanent disability benefits. Rather than comply with this simple request, the administrator designeee of the retirement plan responded, on December 2, 1986, that Norman was not entitled to any such benefits:

> You have asked that we forward the necessary forms to you in order for Mr. Norman to file a claim for "Disability Retirement". Please be advised that in order for Mr. Norman to be considered eligible for a disability allowance from our plan he must be determined to be "Totally and Permanently" Disabled while employed." According to our records, Mr. Norman

> continued to work after his July 8, 1981, injury and, as you indicated in your letter, was terminated not because of injury, but for poor performance. It appears to us as if he is only now becoming disabled and was not totally and permanently disabled during his employment with this company. Therefore, it is our opinion that Mr. Norman is not entitled to disability benefits from the plan.

When Norman's attorney received this letter, he treated it as an outright rejection of any claim Norman might file. Thus, Norman, on January 29, 1988 filed an action in Virginia state court, removed to the United States District Court for the Eastern District of Virginia on February 19, 1988, to force VEPCO to pay him disability benefits pursuant to its plan and ERISA, 29 U.S.C. Sections 1001, et seq. After this action was filed, both sides moved for summary

judgment, and the district court, on September 23, 1988 denied both motions and ordered VEPCO to provide Norman with the proper forms for filing a claim for total and permanent disability benefits.

VEPCO provided Norman with the necessary forms, and shortly thereafter these were completed and filed with the company, along with the affidavits of Drs, Kay and Grant. The claim went to VEPCO's Disability Benefits Committee ("DBC"), which was made up of six person, two of whom were doctors. Dr. W. S. Dingledine was VEPCO's regular medical officer, while Dr. D. e. Slagel was an emergency room physician who served on an hourly basis for VEPCO as a medical advisor. The BDC asked its own two doctor-members to review Norman's medical records, including the

affidavits of Drs. Grant and Kay, and make a recommendation as to whether Norman was totally and permanently disabled while working for VEPCO. Both doctors found that Norman was not so disabled, and this was the unanimous holding of the DBC.

As for the findings of Dr. Grant, Dr. Slagel easily explained them away. Although Dr. Grant specifically stated that Norman had suffered a cerebellum brain stem injury in the 1981 accident, which resulted in a long-term dysfunction in the coordination system of his nervous system, Dr. Slagel for some reason found this diagnosis to be "contradicted by [Grant's] statement that Mr. Norman required no special long-term medical treatment." Also, Dr. Slagel discounted the physical symptoms noticed in 1988 (slow mentation,

indistinct speech, etc.), because they could have been the side effects of medications Norman was then taking. Finally, Dr. Slagel noted that Norman's MRI results were normal.

Norman appealed the DBC's decision to VEPCO's Administrative Benefits Committee, which likewise held that Norman was not entitled to disability benefits. Norman, on March 12, 1990, then appealed this decision to federal district court, in a continuation of his earlier proceeding. While pending before the district court, Norman committed suicide on June 13, 1990, and his widow, as executrix of his estate, has continued the action.

After Norman filed his complaint in district court, both sides moved for summary judgment. The Court heard oral argument, and on December 6,

1990, issued an Order and Memorandum Opinion granting VEPCO's motion and denying Norman's. While mentioning that it was concerned by Dr. Slagel's possible conflict of interest, and also hinting that the result might have been different were the standard of review de novo, the Court nevertheless found for VEPCO because it could not find that the company's actions were an abuse of discretion. Norman now appeals.

In Firestone Tire and Rubber Company v. Bruch, 109 S. Ct. 948 (1989), the Supreme Court held that the appropriate standard of review in ERISA actions under 29 U.S.C. Section 1132(a)(1)(B), challenging denials of benefits based on plan interpretations, is de novo, unless the plan gives its administrator discretionary authority to determine

eligibility for benefits or to construe the terms of the plan. See also De Nobel v. Vitro Corporation, 885 F2d 1180, 1187 (4th Cir. 1989) ("As the Bruch court made plain, what follows from the applicability of the abuse of discretion standard is that the trustee's interpretation of relevant provisions of the plan documents -- hence the challenged denial of benefits -- 'will not be disturbed if reasonable'"). Norman does not deny that VEPCO's plan now under question vests discretionary authority in the administrator to determine benefits eligibility.

It appears that VEPCO has treated this case in a rather high-handed manner, and Dr. Slagel and the DBC probably dismissed Drs. Grant and Kay's analysis too easily. Also, Dr. Dingledine and, most likely, Dr.

Slagel, did have conflicts of interest and in no way could they be said to be totally impartial advisors. Still, there was an overwhelming amount of medical evidence from when Norman was employed by VEPCO showing that his treating physicians then did not believe that his 1981 accident caused total and permanent disability. We thus find that VEPCO did not abuse its discretion when it denied Norman total and permanent disability benefits. The Court below has written a thorough and well-reasoned opinion, and we affirm on that Court's opinion. Norman v. Virginia Electric and Power Company, CA-90-1121-N (E.D. Va. Dec. 6, 1990).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CYNTHIA M. NORMAN, Executrix of the Estate of BRUCE E. NORMAN, deceased,

Plaintiff,

v. Civil Action No. 90-1121-N

VIRGINIA ELECTRIC AND POWER COMPANY, doing business as VIRGINIA POWER,

Defendant.

MEMORANDUM

This is a continuation of an action filed by Bruce E. Norman int he Circuit Court of the City of Chesapeake on January 29, 1988, and removed to this Court on February 19, 1988, seeking relief under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001, et seq. By a memorandum dated September 23, 1988, this Court suggested that since the defendant, Virginia Electric and Power Company (Virginia Power) had not processed

Norman's purported claim correctly and, therefore, Virginia Power as the fiduciary had never acted upon any filed claim by Norman, the action should be dismissed and the parties should start anew except for the allowance of attorneys' fees. On March 12, 1990, another complaint was filed by Norman, and the matter now stands on cross-motions for summary judgment.[1]

While now deemed to be material to the outcome, counsel for the fiduciary has advised that, if Norman's claim prevails, the amount due for Total and Permanent Disability Benefits, as of the date of Norma's termination of employment on September 16, 1985, would be $26,946.91, plus

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[1]The Court has been advised that Bruce E. Norman took his own life on June 13, 1990. The action has been revived in the name of the Executrix of Norman's estate who is also Norman's widow.

prejudgment interest of $5,737.48 as of September 18, 1990.

The crux of this case lies in the definition as sated in Section 1.38 of the 1985 Plan (the same as Section 1.36 of the 1982 Plan) reading as follows:

> Totally and Permanently Disabled means a condition, determined on the basis of medical evidence satisfactory to a physician designated by the Administrator, rendering a Member due to bodily injury or disease, unable to perform services as follows: (i) during the first two years of such disability (measured from the commencement of such disability rather than the commencement of benefit payments) such Member is unable to perform any and every duty pertaining to his employment by Employer; and (ii) thereafter, such Member is unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. In no event shall such condition be deemed to exist during any period that the Member is

> not under the regular care and attendance of a legally qualified physician or during any period that he engages in any occupation or performs any work for compensation or profit.[2]

Norman joined Virginia Power in late November 1965. He sustained a number of minor accidents which resulted in many days of recuperation, prior to July 9, 1981 (should be July 8, 1981) when he sustained what developed to be an injury of major consequence, although Virginia Power continued to record it as a minor injury. An air hose became disconnected with an air lance and hit Norman on the back of his head in the area of the neck. The initial attending physician diagnosed the

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[2]This quotation is from Dominion Resources, Inc., Retirement Plan, originally effective on July 1, 1945 as Amended and Restated effective January 1, 1985. Dominion Resources was, and may still be, the parent company controlling Virginia Power.

injury as a cervical strain; later a CAT Scan proved to be negative; Norman was referred to a neurologist in late July who recommended selective duty for Norman in a "noiseless area"; in proceedings before the Industrial Commission, the attending physician report "Concussion/Post Traumatic syndrome"; in mid-September, Dr. Rice, the attending physician, referred Norman to Dr. Sly as Norman complained about being nauseated due to noise and headaches and Dr. Sly, an ear specialist, could find nothing to substantiate Norman's history of reaction to loud noise on the basis of specific testing.

On December 1, 1981, Dr. Rice admitted Norman to Leigh Memorial Hospital, and on December 7 prescribed no duty for Norman for one month. He was seen by Dr. Neal, a neurosurgeon, who reported that Norman had fully

recovered from the accident of July 8, 1981, but that Norman does have a neurological problem which is a disease of the nervous system that "has come on spontaneously," but that this "possible disease" is not related to the injury of July 8, 1981.

On February 10, 1982, after Workmen's Compensation benefits had ended, Norman was instructed to go back to regular duty as a boiler operator, but several days thereafter Dr. Rice advised that Norman could not do his job as a boiler operator. Norman did work a portion of a day February 16, 1982, but the next day he reported for work and then went home sick. Dr. Rive then certified Norman as "unable to work" for the period of February 17 through March 19. In the interim, Norman requested a medical retirement and attached notes from Drs. Rice and Neal stating that Norman

"is medically disabled from performing any normal work duties." Subsequent certificates of sickness (with one apparent omission) continued Norman's "unable to work" status to July 23, 1982. In the interim again, Dr. Rice reported to an insurance carrier that "any further disability determination should be ideally made by a qualified psychiatrist."

A full Commission review of a prior Industrial Commission decision resulted in the reinstatement of Workmen's Compensation payments retroactive to February 17, 1982. This decision was rendered on September 28, 1982. A further certification of sickness reported Norman as unable to work from September 3, 1982 to October 13, 1982. On the recommendation of his attorney, Norman returned to work on October 23, but did so under protest. He wrote to

his employer, stating, "It is my sincere belief and opinion that my health and safety is in jeopardy as long as I have to do any kind of work." He continued on selective duty status under noise free environment.

In November 1982, Norman was referred to Dr. Kruger for psychiatric treatments. Another psychiatrist, Dr. Magier, selected apparently by Norman's attorney, reported on a letter Norman had written to his attorney as an indication of "a deteriorating mental status, with more and more threatening content, particularly centered around the ideas that I am not getting what I want." Dr. Magier recommended psychotherapy.

In December 1982, Norman was finally referred to Dr. Frederick Woodson, an outstanding and experienced psychiatrist, who has enjoyed an excellent reputation in his

chosen field. Dr. Woodson regularly saw Norman at two-week intervals, and there were some indications of an improved condition, largely by reason of Norman's confidence in Dr. Woodson's ability. In May 1983, Norman was sent to a hospital with a diagnosis of "Post-traumatic neurosis and Drug Toxicity," the latter being due to prescription drugs administered as directed by physicians or perhaps excessively taken by Norman.

In due time Norman was reclassified as a Clerk with a pay reduction from his former classification as a boiler operator. He obviously did not perform as well as other clerks similarly situated. On September 16, 1985, after having reviewed with him his past lack of performance and having been continuously warned that he would have to improve, Norman was discharged for

"poor performance." However, it is equally clear that Norman's "poor performance" is related either to Norman's physical and/or mental condition which has existed essentially since the date of the accident on July 8, 1981.

Prior to September 16, 1985, there is no physician who has stated that Norman was totally and permanently disabled due to a bodily injury or disease while employed by Virginia Power. While Norman was eligible by reason of years of service, we find that the other essentials for being entitled to benefits under the Plan are lacking. True, Norman had little or no difficulty in obtaining statements that he was "medically disabled from performing any normal work duties," including those of a Clerk, but these statements are not sufficient as such

disability must be shown to be "due to a bodily injury or disease." No physician, prior to 1988, connected Norman's disability with a bodily injury. The neurosurgeon, Dr. Neal, does refer to a "disease of the nervous system" as early as December 1981, but also states that this "possible disease" is not related to the injury of July 8, 1981. Nor does Dr. Neal state that Norman was totally and permanently disabled, although he has said that Norman was, in February/March 1982, "medically disabled from performing any normal work duties."

In the first action filed by Norman (No. 88-103-N), Virginia Power filed a motion for summary judgment without mentioning the physicians who had seen and treated Norman after the discharge of September 16, 1985. At oral argument on the motion, it was

revealed that Virginia Power had taken the discovery depositions of Drs. Kay and Grant,[3] and that, at least as to Dr. Grant, he was definitely of the opinion that Norman's condition was related to the industrial accident of July 8, 1981, and that Norman was totally and permanently disabled,[4] at a time that he was employed by Virginia Power.

Since the decision in the first phase of this case was made, the Supreme Court has modified its rule

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[3]The reference to the discovery depositions of Drs. Kay and Grant are stated in the Court's memorandum of September 23, 1988, and are incorporated herein by reference. Kay and Grant were personally retained by Norman, or someone acting in his behalf.

[4]Virginia Power makes much of the fact that Dr. Grant did not see Norman until March 11, 1988 and, therefore, Dr. Grant's opinion should have no bearing on Norman's condition on September 16, 1985 and prior thereto. This argument is frivolous. Virginia Power is now relying upon at least one physician who never even saw Norman.

that all ERISA cases are reviewed from the standpoint of arbitrary and capricious action on the part of the fiduciary. In Firestone Tire and Rubber Company v. Bruch, _____ U.S. _____, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court held that the appropriate standard of review in actions under 29 U.S.C. Section 1132(a)(1)(B), challenging the denials of benefits based on plan interpretations, would be a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Id., 109 S.Ct. at 956.

Since Virginia Power's Plan does vest discretionary authority to determine eligibility for benefits in the fiduciary, the sole issue in this case appears to be whether there has

been an abuse of discretion on the part of the administrator or fiduciary, especially since the administrator is a full-time employee of Virginia Power and may well be apparent under a possible or actual conflict of interest.

As stated in Bruch, supra:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion.

Thus, it makes no difference as to whether the Court would agree or disagree with the views of the many physicians who examined and/or treated Norman. While there may be suggestions that Norman was a malingerer, no physician has branded him as such.

After the decision in the first phase of this case, it was apparent

that the testimony and reports of Drs. Kay and Grant had to be considered.[5] The extent to which they were considered is essentially limited to the views of Dr. Dale E. Slagel who is apparently a medical advisor for Virginia Power.

Other then the fact that Dr. Slagel is a medical advisor for Virginia Power, the record at one time disclosed nothing as to his qualifications except that, in his own statement dated February 15, 1989 (Ex. C, Binder 1), he described himself as a Board Certified Emergency Physician. What specialties he may have had and whether he engages in private practice were unknown. What financial

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[5]As heretofore noted, it was Virginia Power's erroneous view that it did not have to consider whatever Drs. Kay or Grant wrote or said, as these physicians did not see (or even know) Norman while Norman was on the payroll of Virginia Power.

arrangement he had with Virginia Power or its Disability Benefit Committee had not been revealed. In late October 1990, while the Court was drafting its memorandum disposing of this case, counsel for the defendant forwarded to the court, with a copy of counsel for plaintiff, an opinion written by District Judge Spencer in White v. Bell Atlantic Corp., C/A No. 90-00232R (E.D. Va. Sept. 26, 1990), and made supplementary comments as to same. The plaintiff replied, citing conflict-of-interest cases which issue had previously been scarcely mentioned in oral argument, although the Court requested the views of counsel in light of the Bruch opinion of the Supreme Court.

The Court was then, and still is, concerned as to the status of Dr. Slagel, and called upon the defendant to provide an affidavit as to his

relationship with the Power Company; his salary, if any; whether he was a voting member of the Disability Benefits Committee; how he is compensated and by whom, if not salaried; whether and where he is in private practice; and such further information as may be deemed pertinent.

On December 3, 1990, in response to the Court's request, defendant caused to be filed an affidavit of Dale E. Slagel. It appears that Dr. Slagel is a licensed physician in private practice, serving as the Director of the Emergency Department at Stuart Circle Hospital in Richmond, Virginia. Since January 1989, he has also served on an hourly contract basis for Virginia Power's Employee Health Services Department as a medical advisor. This extra work entails about eight hours per week of

his time. Dr. Slagel is not eligible for any employee benefits that are provided by Virginia Power to its employees. He is a member of the Virginia Power Disability Benefit Committee. He is not paid by the Plan or any trust connected therewith, but is compensated directly by the Power Company. Thus, Dr. Slagel voted, on March 15, 1989, as a member of the Disability Benefits Committee, to deny Norman's claim for disability benefits. The vote was unanimous. An appeal was taken by Norman to the Administrative Benefit Committee of Virginia Power, which appeal was heard on June 15, 1989. While Dr. Slagel appeared and answered questions, neither Dr. Dingledine nor Dr. Slagel were members of this Committee and were not present when the appeal was considered by this last group.

It is true that, in addition to Dr. Slagel, Dr. W. S. Dingledine, the Medical Director of Virginia Power, was also asked to review the record for his finding and conclusions as to whether Norman was ever totally and permanently disabled due to bodily injury or disease while employed by Virginia Power. With no disrespect intended, the Court notes that Dr. Dingledine was actively interested in the first phase of this case which was dismissed, and his natural inclination would lead to his same conclusions, even after reviewing the views of Drs. Kay and Grant.

While the issue was not originally asserted by counsel, an immediate question for consideration pertains to a conflict of interest. As to Dr. Dingledine, the conflict appears clear as he is the Medical Director of Virginia Power and

presumably devotes his entire working-time to these duties. Since there was no suggestion in the record that Dr. Slagel was acting in conflict with the authorities cited under ERISA, we do not assume anything improper. True, plaintiff's counsel urges that Dr. Slagel never examined or saw Norman, but it is not represented that he ever did. His function was to review the extensive medical records, with especial emphasis on the deposition of Dr. Grant and the reports of Drs. Kay and Grant as these physicians first saw Norman in 1988.

The Fourth Circuit has considered the conflict of interest issue in a post-Firestone decision. De Nobel v. Vitro-Corp., 885 F.2d 1180, 1191 (4th Cir. 1989). In that case Vitro had developed a fully funded, defined-benefit plan and, while Vitro made contributions to the trust fund, the

benefits decisions had only an immediate impact on the fund itself, with Vitro incurring no direct immediate expense as a result of any determination favorable to a participant in the Plan. Such is the situation in the instant case. As Vitro correctly observes, no "presumptive bias" may be attached to the administrator even though such person may serve a dual role as a company employee and a pension plan fiduciary, citing Lowry v. Bankers Life & Casualty Retirement Plan, 871 F.2d 522, 525-28 (5th Cir. 1989). Fiduciaries are obligated to act not only in the best interests of beneficiaries, but with due regard for the preservation of trust assets. An adverse benefit determination against a claimant may well reflect a

considered decision to preserve the corpus of the trust, rather than grant a doubtful claim.

Since the Firestone/Bruch decision provided that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion," the Court holds in the instant case that there has been no abuse of discretion.

This Circuit, in Boyd v. Trustees of United Mine Workers Health & Ret. F., 873 F.2d 57 (4th Cir. 1989), also discussed the effect of the Firestone/Bruch opinion, but that case pertained primarily to the specific wording of "total disability" as specified in the Pension Plan. Applying the abuse of discretion

standard pre-Bruch, it followed that the benefits would necessarily be compelled under post-Bruch standard.

That the Firestone/Bruch opinion has been given varying interpretations cannot be questioned. It may, in due time, be given some further consideration in this Circuit. In Newell v. Prudential Ins. Co. of America, 904 F.2d 644 (11th Cir. 1990), the Court upheld the finding that Prudential's procedure for having its own employee make a determination of medical needs does not violate ERISA as a matter of law but, since the payments for these medical needs came from the insurance company, and not directly from the assets of a trust fund, it was incumbent upon the court to apply a heightened inquiry because, factually, it presented a

conflict of interest where Prudential was paying out its own money for these medical needs.

In Brown v. Blue Cross & Blue Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990), District Judge Melton, writing for the Court, held that while Firestone did not alter in form the standard applied to a fiduciary's opinion, the substance of review was subtly altered by the opinion. Id. at 1558. In pointing out the conflict in Brown, the Court said:

> Because an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business.

In a case cited by the Supreme Court in Firestone, it is said:

> Where . . . the claimant does not argue or is unable to show that the trustees had a significant conflict of interest, we reverse the denial of benefits only if

> the denial is completely unreasonable. [Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1053 (7th Cir. 1987)].

In the very recent case of Nunez v. Louisiana Benefit Committee, 1990 U. S. Dist. LEXIS 13113, decided October 4, 1990, on a motion to reopen the case previously decided in June 1988, the district court commented:

> Determining whether or not an employee is disabled by relying upon the physician's opinion over those of the plaintiff's physicians and of an independently appointed Social Security examiner is not the type of discretionary authority envisioned in Firestone as subject to only to [sic] an arbitrary and capricious standard of review.

It is because of these recent decisions interpreting Firestone that this Court has attempted to apply a modified heightened inquiry to the issue presented. While presently the Court sees no problem as to any conflict of interest, the court in

Nunez appears to suggest that the act of relying upon a company chosen physician is sufficient to refute the arbitrary and capricious standard and, inferentially at least, intimates the necessity for a heightened inquiry. While this Court does not agree with Nunez, it is willing to make the heightened inquiry as applicable to the factual picture presented to determine whether the fiduciary acted in an arbitrary and capricious manner.

As the Court has heretofore indicated prior to the examinations and reports by Drs. Kay and Grant, there was a complete absence of medical opinion giving substance to Norman's claim of total and permanent disability as defined by the Plan.. Had the litigation been pending at any time prior to the examination by Drs. Kay and Grant, the Court would have been required to grant any motion for

summary judgment for the reason that no proof of total and permanent disability, as defined by the Plan, had been submitted. The 1988 reports of Drs. Kay and Grant created an issue of fact, but not necessarily for the Court to decide. Dr. Kay had been treating Norman since February 1986, having replaced Dr. Woodson as a psychiatrist. On the other hand, Dr. Woodson, a psychiatrist, treated Norman for about three years prior to his discharge on September 16, 1985, and at no time ever said that (1) Norman was totally and permanently disabled, (2) due to bodily injury or disease, (3) unable to engage in any occupation or perform any work form

compensation or profit (4) for which he may be reasonably fitted by education, training or experience.[6]

It should be mentioned that the many physicians to whom Norman was referred, except Dr. Dingledine, are not on the payroll of Virginia Power, or any affiliate company, so far as may be determined from this record. In all probability they may have served as examining or attending physicians on a case-by-case basis, depending upon the nature of the injury, their promptness in filing reports, their cooperation or lack of same, their specialties if any, and many other facts. This does not suggest any bias or conflict-in-

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[6]Section 5.01 of the Plan, relating to Disability Retirement Allowance, is also involved in this case, but it comes into play only after there has been a determination of total and permanent disability. It is therefore, unnecessary to discuss this provision of the Plan.

interest, anymore than what could be charged to a physician employed by a plaintiff or a defendant in an injury or disease matter.

While the testimony of Drs. Kay and Grant raises a factual issue, the trier of fact in this case is not the judge. Because of the discretion granted to the fiduciary by the terms of the Plan, the Court is limited to a determination as to whether the employer, through the terms of the Plan, acted arbitrarily or capriciously. Since the views of Drs. Kay and Grant have now been considered by Dr. Slagel, and since he disagrees with their findings and conclusions, it is not for the Court to determine which view to accept.

Under the provisions of 29 U.S.C. Section 1108(c)(3), it is stated that-

> Nothing in section 1106 of this title shall be

> construed to prohibit any fiduciary from--
>
> * * *
>
> (3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

Section 1106 contains a list of prohibited transactions wherein the fiduciary is not permitted to participate. The approval or disapproval of a health and benefit claim is not listed as a prohibited act. In this case the Plan merely instructed the administrator (Bartholomew) to select a physician to assist, in turn, in making the final decision. Actually, Virginia Power established a two-tier group to make the decision, and on the first level Dr. Slagel was a voting member of this Committee, but he was not even a member of the Committee which made the final decision on the appeal from the

first-tier. Obviously, Congress had the conflict-in-interest issue in mind when it enacted ERISA, but the Congress decided that the mere appearance of a conflict-in-interest was insufficient.

As Bruch has stated, the exercise of a power of discretion is not subject to the control of the court absent any abuse of discretion by the fiduciary. Without personally seeing and hearing all the testimony of the many doctors called upon to examine and treat Norman, it is even now impossible for this Court to determine whether Norman met the requirements of total and permanent disability from a bodily injury or disease while employed by Virginia Power. While it may be argued that the qualifications of Drs. Grant and Kay may appear, on this record, to be better then that of Dr. Slagel, no information was sought

as to Dr. Slagel's qualifications or past experience. Assuredly, there is no requirement that the physician expressing his opinion as to a claimant's alleged total and permanent disability be a specialist in the field of medicine which may correspond with such a field in which one or two doctors may have concluded that the claimant was totally and permanently disabled as a result of a bodily injury or disease. In this case, even if there was such a requirement, it is noted that Norman was examined and/or treated by psychiatrists, neurologists, orthopedists, and many others having specializations, without any firm determination as to the cause of his condition. The fact that two physicians, eight years after an accident, conclude that Norman was totally and permanently disabled by reason of bodily injury sustained

while in the employment of Virginia Power, while entitled to serious consideration by the physician advising the fiduciary, if far from conclusive. The views and conclusions of the two physicians finding total and permanent disability by reason of bodily injury or disease have been considered and rejected by a physician designated by the fiduciary, and the Court cannot strike down one of the purposes of ERISA to afford relief.

Finally, plaintiff's counsel urges that since the Court, in the prior action (No. 88-103-N), found arbitrary and capricious conduct by not sending the required forms and information, and the Administrator having acted as the judge and jury, this prior action alone is sufficient to justify a de novo review. A reading of this Court's prior opinion merely demonstrates that the defendant

did not comply with a separate statute requiring the fiduciary to make available certain information.[7] This point, raised by plaintiff's counsel, is frivolous.

For the reasons stated herein, an order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment, resulting in a final judgment for the defendant, is this day being entered.

/s/Walter E. Hoffman
Senior United States District Judge

At Norfolk, Virginia
December 6, 1990

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[7]While the reasons are not disclosed in the record, it should be noted that the former Administrator was transferred by Virginia Power to another position.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CYNTHIA M. NORMAN, Executrix of the Estate of BRUCE E. NORMAN, deceased,

Plaintiff,

v. Civil Action No. 90-1121-N

VIRGINIA ELECTRIC AND POWER COMPANY, doing business as VIRGINIA POWER,

Defendant.

O R D E R

For reasons stated in a memorandum this day filed, the defendant's motion for summary judgment is GRANTED; the plaintiff's motion for summary judgment is DENIED; and there being no other matters to determine it is

ORDERED that final judgment be entered in favor of the defendant and against the plaintiff, together with the taxable costs, if any, expended by said defendant. The costs, if any,

shall be assessed only against the Estate of Bruce E. Norman, deceased.

Copies of this order and the memorandum referred to herein have this day been mailed to counsel of record.

/s/ Walter E. Hoffman
Senior United States
District Judge

At Norfolk, Virginia

December 6, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRUCE E. NORMAN,

Plaintiff,

v. Civil Action No. 88-103-N

VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a VIRGINIA POWER,

Defendant.

MEMORANDUM

This action was filed in the Circuit Court of the City of Chesapeake on January 29, 1988, and removed to this Court on February 19, 1988.

Norman, then an employee of the defendant, was injured on July 8, 1981 in an industrial accident at which time he was struck on the back of the head and neck by a heavy object. Overlooking for the moment the time missed because of claimed disability to perform his work, together with the time he missed while collecting

Workmen's Compensation benefits, he continued his employment with the defendant until September 16, 1985, at which time he was discharged for "poor performance," which is obviously related to his physical and/or mental condition which has existed essentially since the date of his accident.

The defendant maintains a disability retirement program which is covered by the provisions of ERISA, 29 U.S.C. Section 1001, et seq., and includes provisions for total and permanent disability if such total and permanent disability occurred while plaintiff was employed by the defendant.

Norman has been constantly evaluated since his 1981 accident. On March 11, 1982, Norman wrote to defendant's Station Superintendent, forwarding letters from two

neurologists stating that he was "medically disabled from performing any norman work duties." Dr. Dingledine, defendant's medical officer, did not agree as to whether Norman was "unable to perform any meaningful work for Vepco." In 1984, apparently at the request of defendant's medical officer, Norman was evaluated in Richmond, Virginia, by Dr. Brooks of Tucker Psychiatric Clinic, and Dr. Fielding, a psychologist with Richmond Health Psychology Services. Neither report gives much encouragement for any improvement in Norman's condition, but Dr. Fielding did express the viewpoint that Norman could perhaps work as a clerk. Norman's attending psychiatrist, Dr. Frederick G. Woodson, of Norfolk, also indicated that Norman could "fill a clerical job." During the summer of 1984,

Norman was assigned a clerk's job and remained on the payroll in that capacity until discharged in September 1985. It is quite apparent that Norman was not performing his clerk's job and there is ample evidence--if we overlook his condition--of "poor performance."

On August 15, 1986, Norman's then attorney (now deceased) wrote to the defendant requesting claim forms for the purpose of filing a claim for total and permanent disability. Rather than comply with this simple request, the administrator-designee of the plan, K. L. Green, responded on December 2, 1986, as follows:

> You have asked that we forward the necessary forms to you in order for Mr. Norman to file a claim for "Disability Retirement." Please be advised that in order for Mr. Norman to be considered eligible for a disability allowance from our plan he must be determined to be "Totally

> and Permanently Disabled while employed." According to our records, Mr. Norman continued to work after his July 8, 1981, injury and, as you indicated in your letter, was terminated not because of injury, but for poor performance. I appears to us as if he is only now becoming disabled and was not totally and permanently disabled during his employment with this company. Therefore, it is our opinion that Mr. Norman is not entitled to disability benefits from the plan.

Under 29.U.S.C. Section 1132, it is provided that a civil action may be brought by a participant or beneficiary--"(A) for the relief provided for in subsection (C) of this section" which reads:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of

> the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

The administrator-designee never has provided any claim form--nor did said party comply with the request of Norman's attorney to forward a copy of the retirement plant until after this action had been filed.[1]

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[1]The imposition of any statutory penalty under 29 U.S.C. Section 1132(c) is solely discretionary. There is not contention that the plaintiff was prejudiced unless the defendant should contend that plaintiff is barred from filing any claim because of delay. While the Virginia Electric and Power Company (VEPCO) does request that all claimants use a claim form, the Court finds nothing that requires the providing of any such form. Apparently, only the copy of the retirement plan and any rules or regulations need be provided to a participant upon request, unless otherwise specified in the plan.

VEPCO has had a retirement plan for its employees at least since July 1, 1945. From time to time it ha been amended, but we are concerned only with the plans made effective on January 1, 1982 and January 1, 1985. For the purposes of this case, the two plans are identical. In 1983, VEPCO became a wholly-owned subsidiary of Dominion Resources, Inc., and the 1985 plan thereafter became effective. Since Norman was originally injured on July 8, 1981, we call attention to Article I, Section 1.36 (giving the definition of "Totally and Permanently Disabled") and Article V (covering "Disability Allowance"), as contained in the 1982 plan; as contained in the 1985 plan adopted by Dominion Resources, Inc., for the operation of VEPCO retirement benefits.

Sections 1.36 (1982 plan) and 1.38 (1985 plan) provide the following definition:

> Totally and Permanently Disabled means a condition, determined on the basis of medical evidence satisfactory to a physician designated by the Administrator, rendering a Member, due to bodily injury or disease, unable to perform services as follows: (i) during the first two years of such disability (measured from the commencement of such disability rather than the commencement of benefit payments) such Member is unable to perform any and every duty pertaining to his employment by Employer; and (ii) thereafter, such Member is unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. In no event shall such condition be deemed to exist during any period that the Member is not under the regular care and attendance of a legally qualified physician or during any period that he engages in any occupation or performs any work for compensation or profit.

Article V, Section 5.01 (both plans) reads:

> Disability Retirement Allowance. Except as otherwise provided below, a Member who is vested in his Accrued Benefit Derived From Employer Contributions in accordance with Section 4.04 or who as 15 years of Service and is determined to be Totally and Permanently Disabled while employed by Employer shall be entitled to a monthly retirement allowance commencing as of the effective date of such determination, if the Member is then living, and continuing on the first day of each month thereafter during his lifetime. The amount of such monthly retirement allowance shall be his Accrued Benefit as of the date as of which he is determined to be Totally and Permanently Disabled: provided, however, that such benefit shall not be offset by the Member's Primary Social Security Benefit unless he would also qualify for disability benefits (assuming he had applied

therefor) under the Federal Social Security Act.[2]

When Norman's attorney received the latter of December 2, 1986, he treated the same as an outright rejection of any consideration of any claim that Norman could possibly file. Nevertheless, Norman continued to receive treatment and evaluations as to his condition and it can be said without contradiction that he has, at all times, been under the care of competent physicians, trained in the fields of psychiatry and neurology.[3]

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[2]After Norman was terminated on September 16, 1985, he applied for benefits under the Social Security Act and has been found to be totally and permanently disabled. The Court attaches no significance to this finding. Whether it may become of importance on further proceedings is not for this Court to decide at this time.

[3]Until the fall of 1985, Norman was treated by Dr. Frederick G. Woodson, and others before Dr. Woodson became recognized as Norman's treating physician. It is not clear from the record whether Norman changed doctors

After defendant filed its motion for summary judgment and at the time the matter was orally argued, the Court learned that defendant had also taken the discovery depositions of Dr. Kay and Dr. Grant. The Court permitted these depositions to be filed as a part of plaintiff's response to the motion for summary judgment. Following his initial clinical evaluation on February 17, 1986, Norman was seen by Dr. Kay nine more times in 1986; nine times in 1987; and sic times in 1988 prior to Dr. Kay's deposition on July 15, 1988. Dr. Kay is clearly Norman's treating physician. Dr. John L. Grant, to whom Norman was referred by Dr. Kay, saw

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on his own initiative in February 1986, at which time he went to Dr. E. Daniel Kay, a psychiatrist, or whether he made the change because of Dr. Woodson's contemplated retirement. Dingledine Ex. P., a letter from Dr. Woodson, suggests that Dr. Woodson's pending retirement was not the cause.

Norman on March 11, 1988 and has also given his deposition on discovery by the defendant. It is abundantly clear that Dr. Grant relates Norman's post-traumatic neurosis and dystonic disorder to the industrial accident of July 8, 1981, which is contrary to the opinion of Dr. Woodson expressed in his letter of November 26, 1985 after Norman had been terminated. Admittedly, however, when the attorney wrote his letter of August 15, 1986 (which defendant claims was not received), followed by his letter of November 4, 1986, there was at that time no available medical testimony to the effect that Norman's condition was related to the accident of July 8, 1981, and only suggestions that Norman was totally and permanently disabled. However, since defendant saw fit to treat the matter as no claim ever having been filed, we now have

testimony from Dr. Grant that Norman condition is related to the injury of July 8, 1981. To a lesser extent the same is true of Dr. Kay. When and if a claim is properly presented, it should then be referred to the Disability Benefit Committee (See Plan, section 1101(d)).[4] The statute then requires that Norman be advised in writing as to decision reached with respect to Norman's claim.

Green's letter of December 2, 1986, states: "It appears to us as if he [Norman] is only now becoming disabled and was not permanently disabled during his employment with this Company." Such a statement is not a review of the medical evidence already known by the defendant, but is

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[4]It is obvious that the administrator-designee, Green, who wrote the letter of December 2, 1986, never took Norman's matter up with the Disability Benefit Committee.

based upon the false assumption that a person on defendant's payroll could not be totally and permanently disabled. While the Court agrees with the Defendant that the total and permanent disability must have arisen from injury or illness while the employee was employed by the company, it does not follow that he could not be on defendant's payroll and, at the same time be totally and permanently disabled.

With due respect the defendant has misinterpreted its own definition of total and permanent disability. There is no prohibition upon a finding of total and permanent disability merely because the employee performs any work for compensation or profit. This merely means that during the time the employee is on the payroll, the employee cannot, at the same time, be compensated as being totally and

permanently disabled. Additionally, a review of the medical reports will reveal that there is doubt as to whether Norman can engage in any occupation "for which he is or may become reasonably fitted by education, training or experience."

Defendant, according to the oral argument in this matter, has also referred to Section 5.01 which states, in part, that a Member is entitled to a monthly retirement allowance if he "has 15 years of service and is determined to be Totally and Permanently Disabled while employed by Employer." Thus, the defendant argues that the finding of total and permanent disability must be made during the existence of the employer/employee relationship. Once again, if this be the correct interpretation, there is little likelihood that any employee could

ever be determined to be totally and permanently disabled. Indeed, as interpreted, it approaches a due process violation.

As stated, Green's letter did not attempt to state anything resembling a medical conclusion as to total and permanent disability. It was an act which was, in law, arbitrary or capricious. It was a premature judgment based upon an erroneous interpretation of defendant's own plan.

The provisions of 29 U.S.C. Section 1133 were aborted by defendant and, in addition, no reasonable opportunity was afforded Norman to secure a full and fair review if, indeed, Green's letter of December 2, 1986, can be viewed as a denial of a claim which never was filed.

There is no remedy available to Norman for any extracontractual

damages caused by improper or untimely processing of benefit claims. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985). This is true even though Section 502(a)(3) authorizes the award of "appropriate equitable relief" directly to a participant or beneficiary to redress "any act or practice which violates any provision of this title or the terms of the plan." Green's letter did, however, invite response from the attorney, which was never acted upon.

CONCLUSION

Certainly it would be inappropriate for the Court to grant or deny benefits to Norman under 29 U.S.C. Section 1132(a)(1)(B).[5] The

[5]Counsel agreed that the decision on the motion for summary judgment would resolve the entire matter and that a final judgment could then be rendered. The Court does not agree to such a simple solution. Fact-finding

fiduciary has never acted upon any filed claim, and Green's premature action was apparently for the purpose of discouraging the filing of any claim. The parties should start anew, except for the assessment of attorney's fees as provided by 29 U.S.C. Section 1132 (g)(1), the allowance of which is reserved conditioned that a petition for same, with appropriate affidavit as to time spent and reasons therefor, be filed within 60 days from the date of the final order in this particular case, unless an appeal is noted in which event the time for filing said petition for attorney's fees shall be extended to 60 days from the date of the receipt of any mandate.

The defendant's motion for summary judgment, relating almost

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is not the task of a judge in an ERISA action.

entirely to the medical evidence available at the time Green wrote his letter of December 2, 1986, is DENIED. In further proceedings whatever medical evidence is then available shall be reviewed by the Disability Benefits Committee whose names shall be revealed in any decision to be rendered.[6]

While the Court could probably remand this case to the fiduciary, there are obvious problems in the event of an appeal. Since this action was brought under 29 U.S.C. Section 11332(c) and also to recover benefits under 29 U.S.C. Section 1132(a)(1)(B),

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[6]In oral argument defendant's counsel led the Court to believe that defendant's medical officer, Dr. Dingledine, effectively constituted the Committee. While the Committee, under Article XI, Section 11.04, may delegate authority to sign documents or perform solely ministerial acts, this does not suggest that the Committee should not function or should delegate to Dr. Dingledine all decisions to be made.

and the Court notes the statutory use of the work "or," the Court would prefer dismissing without prejudice that portion of any relief sought under 29 U.S.C. Section 1132(a)(1)(B), and grant plaintiff relief under 29 U.S.C. Section 1132(a)(1)(A).

The defendant will forthwith forward to the plaintiff or his attorney any form or forms for use in filing a claim for total and permanent disability retirement benefits, together with any rules, regulations and/or policies (other than the two plans now provided) which VEPCO has pertaining to disability retirement of employees.

The judgment, to the extent that it is seeking relief under 29 U.S.C. Section 1132(a)(1)(A), is for the plaintiff with taxable costs, reserving the right to petition for attorneys' fees as specified herein.

The action seeking relief under 29 U.S.C. Section 1132(a)(1)(B) is dismissed without prejudice to the plaintiff's right to proceed anew. If, however, there is any involvement of the statute of limitations and defendant will not waive this as a defense, the Court will then consider merely remanding this matter to the fiduciary.

Counsel will confer and present an appropriate judgment order. The time for appeal shall not commence until the entry of such order.

/s/Walter E. Hoffman
Senior United States
District Judge

At Norfolk, Virginia

September 23, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRUCE E. NORMAN,

Plaintiff,

v. Civil Action No.

VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a Virginia Power,

SERVE: Irene M. Moszer, Registered Agent
1 James River Plaza
Richmond, Virginia 23261

Defendant.

COMPLAINT

1. This suit is brought pursuant to Title 29, U.S.C. Section 1001, et seq. and more particularly Section 1132.

2. Plaintiff previously brought suit in the state Circuit Court which was removed by Defendant to this Court and decided by this Court in a memorandum decision by Judge Walter E. Hoffman, attached hereto as Exhibit A (hereafter known as the Hoffman decision).

3. Pursuant to this decision, Defendant was compelled to review the claim of Plaintiff for disability benefits as a result of an on-job accident to Plaintiff caused by a steam hose's separating while operated by Plaintiff impacting the back of Plaintiff's head and neck, without warning.

4. After several years, Dr. John L. Grant, a neurosurgeon, determined that the Plaintiff had been, as a result of said accident, permanently injured and diagnosed such as a brain stem cerebellum injury. This caused and continues to cause Plaintiff to be permanently disabled. Dr. E. Daniel Kay, Plaintiff's treating physician, a psychiatrist, also corroborated this diagnosis.

5. Plaintiff submitted the following exhibits for consideration to Defendant whose Disability Benefit

Committee reviewed and rendered an adverse decision to Plaintiff which is attached hereto. (Exhibit B) Exhibits are as follows:

Exhibit C - Deposition of Dr. John L. Grant, Neurosurgeon, of July 14, 1988.

Exhibit D - Dr. John L. Grant's medical reports of March 11, 1988, April 1, 1988 and June 27, 1988.

Exhibit E - Expert Credentials of John L. Grant, M.D..

Exhibit A - Memorandum Opinion of Judge Walter E. Hoffman of September 23, 12988.

Exhibit F - Dr. E. Daniel Kay's medical reports of October 1, 1986, January 12, 1987 and May 25, 1988.

Exhibit G - Expert Credentials of Dr. E. Daniel Kay, Jr..

Exhibit H - Observations of Bruce Norman's dentist, Dr. Richard B. Harris, D.D.S., in report of July 8, 1987.

Exhibit I - Deposition of Cynthia Moore Norman, wife of Bruce Norman, of July 15, 1988.

6. Plaintiff avers that the decision of the Disability Benefit Committee of Virginia Electric and

Power Company, d/b/a Virginia Power, is improper, that it is arbitrary, that it is capricious and ignores the uncontradicted determination of Dr. John L. Grant without meaningful basis.

7. The appeal to Defendant's Administrative Benefit Committee upheld the Disability Benefit Committee's decision. (See Exhibit J)

8. Plaintiff is disabled and unable to work and is entitled to the Defendant's disability benefits pursuant to its Plan. (Exhibit K)

9. Plaintiff seeks this Court's judgment for damages, attorney's fees on behalf of Plaintiff, past-due benefits and court costs from Defendant since his termination of employment by Defendant in September 1985 and for continuing disability

benefits for his permanent on-job injury, from Defendant.

/s/ Bruce E. Norman

/s/ Albert C. Selkin, Esquire
WHITE AND SELKIN
Norfolk Commerce Center III
5425 Robin Hood Road, Suite 200
Norfolk, Virginia 23513
(804) 853-9386

JOHN L. GRANT, M.D., P.C.
Maryview Medical Arts Building
3640 High Street, Suite 2E
Portsmouth, Virginia 23707
(804) 399-6105

March 11, 1988

E. Daniel Kay, M.D.
4037 Taylor Road, Suite A-1
Chesapeake, Virginia 23321

Re: NORMAN, Bruce

Dear Dan:

Thank you very kindly for your confidence in allowing us to evaluate your patient, Bruce Norman. As you well know, Bruce, is a forty-seven years old man who after active military service obtained a job with VEPCO and worked for them for a number of years until 1981.

In July, 1981 he apparently suffered an injury while at work in which a pneumatic hose broke loose from its attachment and struck him from the

back of the head. At the time he was 6 feet, 1 inch and weighed approximately 190 pounds. He was thrown forward approximately six to seven feet according to his report and suffered instantaneous severe headache and neck pain and a welt across the back of his upper neck and lower head. Apparently he was able to get up shortly after the injury under his own power and sought medical attention and was sent home and he was able to drive himself home from the injury. According to his report and his wife, his present physical state has been essentially unchanged or worsened slightly since the day of his injury such that everything we see today was present at the day of the injury except his weight.

He is a 240 pounds, 6 feet man who is of very slow mentation, dysarthric, and walks with a wide-based unsteady gait who, however, does appear to have a fairly good mental acumen. His speech is appropriate and considerate.

On specific neurological examination he has full extraocular muscle movement without nystagmus. He has no evidence of major facial nerve abnormalities. He complains about hyperacusis and puts plug in either ear because any noise level causes severe irritation. He has some restriction of motion of the neck in all directions but has essentially seventy-five percent normal mobility. He has good strength in upper and lower extremities and hypoactive but symmetrical reflexes. Again, his gait is unsteady. He walks with a wide-

based gait and appears almost drugged much of the time as far as his ability to sit up straight or get from a sitting position to a standing position. He has had extensive evaluations since his injury including recently MRI scan of the cervical spine and his head. These tests were essentially unremarkable although he had some mild degenerative changes in the lower cervical region in an area where he has no significant complaints.

It is my impression that Mr. Norman did suffer a significant concussive injury to his cerebellum and lower brain stem although this does not appear to have caused any major physical damage to these structures it has apparently caused some functional damage to these structures and will

well explain many of his present complaints including the dysarthria, imbalance, ataxia and hyperacusis. To my thinking there is no medical therapy for his complaints. Obviously they are of long standing nature and are not associated with any major anatomical abnormalities of the brain stem or cerebellum. Appropriate treatment has been instituted including intensive psychotherapy, medications to deal with his pain and an exercise program to reduce weight and improve his overall physical functioning.

In my opinion in the present state of this patient, he is unfit for any kind of gainful employment. In view of the fact that this has lasted for approximately seven years, it is unlikely this patient will ever return

to any kind of significant gainful employment.

Sincerely,

/s/ John L. Grant, M.D.

JLG:slh

JOHN L. GRANT, M.D., P.C.
Maryview Medical Arts Building
3640 High Street, Suite 2E
Portsmouth, Virginia 23707
(804) 399-6105

April 1, 1988

E. Daniel Kay, M.D.
4037 Taylor Road
Suite A-1
Chesapeake, Virginia 23321

Re: NORMAN, Bruce

Dear Daniel:

I had the opportunity of talking to Mr. and Mrs. Norman again today. The pain he describes in the back of his head and neck was a burning, disagreeable sensation. In general, because it is a diffuse phenomenon that goes from the base of the skull in the upper part of the neck all the way to the top of the head and involves both ears, it overlaps many dermatomal patterns and is not just a simple case of occipital neuralgia

like we frequently see. Some times with a solitary occipital neuralgia on one side, recurrent injections or even cutting the nerve can be of benefit. But normally, this kind of pain is a lancinating severe, sharp kind of pain along the distribution of one nerve. What Mr. Norman has, is this constant achy, burning sensation on the back of his head and cutting nerves generally produces a more disagreeable sensation of a dead, thick burning area of the scalp. Likewise, injection has very little to offer him as there are so many points of injection as to be too numerous to be practical. However, systemic treatment with either Tegretol or Dilantin may be of some benefit or at times, Periactin may be of benefit. A trial of any of these medicines should be considered, however they have to be closely

monitored and would institute only one a time and withdraw before instituting the second therapy if the first was unsuccessful.

Because of your close association with the patient and the dangers of using medications on a patient like this, I am going to defer to your judgment on which form of medicine to try but certainly would be happy to see the Norman's back in the future if the need arises.

Sincerely,

/s/ John L. Grant, M.D.

JLG:sbh

JOHN L. GRANT, M.D., P.C.
Maryview Medical Arts Building
3640 High Street, Suite 2E
Portsmouth, Virginia 23707
(804) 399-6105

June 27, 1988

Albert C. Selkin
Attorney at Law
1110 United Virginia Bank Bldg.
Five Main Plaza East
Norfolk, Virginia 23510

Re: NORMAN, Bruce

Dear Mr. Selkin:

I had the opportunity of examining Mr. Norman on two occasions, March 11, 1988 and in followup, April 1, 1988. In addition, I received information from Dr. Daniel Kay regarding Mr. Norman's previous medical history and reviewed the MRI scan that was performed on Mr. Norman's brain and cervical spine. The brain MRI scan showed very small irregularities in the white matter which was thought to be most likely insignificant and the cervical MRI scan showed some

degenerative changes in the cervical spine.

It is our understanding that Mr. Norman suffered an injury in July, 1981 when a pneumatic hose broke loose and struck him from behind in the back of his head and threw him a number of feet. Since that time, he has been completely incapacitated from working, complains of chronic headaches, disorientation, dizziness. His physical weight went from 190 pounds at the time of injury to 240 pounds at the present time.

The patient's examination showed him to have slow mentation. His speech was indistinct and he walks with a mildly wide based unsteady gait.

It was our estimation that Mr. Norman did suffer some form of cerebellar brain stem injury as a result of his head injury that has resulted in a long term dysfunction in the coordination system of his nervous system although a specific anatomical lesion cannot be identified on the neuro-imaging studies. He certainly from a functional standpoint has been severely effected by this injury and in view of the fact that his complaints have lasted on for these seven years, it is unlikely that he will have a major, significant improvement in his overall condition any time in the future.

I do not foresee that he will require any special long term medical management or surgical therapy for his condition.

If there are any further questions, please do not hesitate to contact me.

Sincerely,

/s/ John L. Grant, M.D.

JLG:sbh

Enclosure

BY MS. EPPS:

Q. In the first paragraph you refer to information you received from Dr. Kay regarding Mr. Norman's medical history?

A. Yes.

Q. Is that the information that you received in the letter dated February 15, 1988?

A. That is correct.

Q. There was no other information Dr. Kay provided in the medical history?

A. No.

Q. In the letter you say that you reviewed the MRI Scan performed on Mr. Norman's brain and cervical spine?

A. That's correct.

Q. Who conducted that test?

A. The test was done by Medical Center Radiologists and I believe

it was done at Norfolk General Hospital, although they have another location listed on here, too.

Q. When was the test conducted?

A. The test was performed January 19, 1988.

Q. And Dr. Kay gave you the information on the MRI Scan, is that correct?

A. Yes. He sent me a copy of the official chart report.

Q. Did he made any comment, either orally or in writing, when he gave the report to you?

A. No. Just what was written in this letter.

Q. When you say this letter, you mean the letter dated February 15, 1988?

A. Yes.

Q. And is it correct that you

believed that the very small irregularities and the white matter which appeared on the MRI Scan of Mr. Norman were "most likely insignificant"?

A. I would agree with the radiologist, yet.

Q. And the MRI Scan did not reveal any specific anatomical lesion?

A. That's correct.

Q. And so the MRI Scan didn't explain anything or any of the complaints that Mr. Norman made to you in your examination.

A. That's right.

Q. Did you observe any facial weakness or any weakness on Mr. Norman's left side when you examined him in March?

A. I did not feel that it was any kind of marked asymmetry to the face, no.

Q. In other words, you didn't think it was significant?

A. That's correct.

MS. EPPS: Let me take just a minute to make sure I don't have any other questions. I think I'm just about done. (Pause) No. I don't have anymore questions, but I'm going to ask the court reporter to mark the last letter which you identified as your letter to Mr. Selkin dated June 27, 1988, as Grant Exhibit 4.

(The document last-above referred to was marked by the reporter as Deposition Exhibit #4 for identification only.)

CROSS EXAMINATION BY MR. SELKIN:

Q. Dr. Grant, let's see, in reviewing your reports and with regard to your examination of Mr. Norman and the apparent examination of the MR Scan, was the MR Scan conducted at your request?

A. No, it was not.

Q. At whose request, if you know?

A. It may have been done at Dr. Kay's request. It does not specifically state on the report who requested it.

Q. From whom did you receive the MR Scan report?

A. It was attached to the letter Dr. Kay sent me.

Q. As a result of that MR Scan and as a result of your later evaluation of Mr. Norman is there any need for a more -- is there

any need for any other sort of test in that area?

A. It's my opinion that at least as far as an imaging test, that's looking at brain matter, there would be nothing further to be added. There are hearing tests and specific hearing tests that could be done to evaluate his hearing. That certainly could be done.

Q. All right. With regard then to the MR Scan that you have and looking at your letter of June 27, 1988, I note that in -- If you would review the letter entirely and essentially I'm going to be asking you about the fourth paragraph.

A. Okay. (Pause)

Q. I need to be clear on the MR Scan. What is the purpose of the

MR Scan, the imaging test?

A. Again, a MR Scan is a highly sophisticated computerized test which does not require x-ray, but rather a high intensity magnetic field whereby any part of the body can be visualized in it's inner core. It's used primarily in neurosurgery as far as the brain is concerned to look at the actual physical structures of the brain, their relationship to one another, whether their present, where there are abnormalities within what would otherwise be considered normal structures, So it's a visualization actually of the brain matter by way of this technology.

Q. So you're looking at the physical structure of the brain?

A. That's correct.

Q. Are you looking at the physical structure of nerves in the brain stem?

A. No. We cannot have a resolution to that degree.

Q. If there is damage to the nerves. I take it neurology pertains to nerves?

A. That's correct.

Q. If we cannot see the nerves through this imaging test are we able to determine from the imaging test itself that the nerves in the brain stem are damaged?

A. Not absolutely, no.

Q. When you say not absolutely could you tell me what that means in layman's language, I guess?

A. Again we can see many patients who suffer from neurological disorders, seizures, Parkinson's

Disease, you can name a fair number of then, in which an imaging of the brain can be absolutely normal and yet a person could be severely affected. You could have a normal MR Scan of a patient in a coma unexplaining why they're in a coma. So the fact that you don't find anything just means that there's not a large physical destructive lesion of the brain, but does not negate the possibility of functional disruption of the elements of the brain.

Q. When we speak about a specific anatomical lesion, in fact, I think that's your language in your fourth paragraph, could you in layman's language tell me what a specific anatomical lesion, I

suppose define, perhaps exemplified?

A. Yes. Well, for example, a tumor is a lesion or a blood clot is a lesion. An abnormal collection of blood vessels is a lesion. The term lesion in medicine purely defines any abnormality that is structural that you can see and anatomical, again defining it further, is talking about a structural element of the brain and specifically again looking for a very well-circumscribed lesion that can be pointed out and say there it is.

Q. The fourth paragraph of your letter, the first statement, "It was our estimation". I presume our estimation refers to you yourself, Dr. Grant?

A. That is correct.

Q. It is your estimation?

A. Yes.

Q. That Mr. Norman did suffer a brain stem injury?

A. That's correct.

Q. As a result of the on-job injury which he described to you?

A. That's correct.

Q. And that has resulted in a disfunction of his nervous system, is that it?

A. Yes.

Q. And specifically with regard to his nervous system you refer to the coordination system of that nervous system that has been damaged on a long-term basis?

A. That's correct.

Q. Could you tell me what is the coordination system of the nervous system? And, bear in mind, when we ask you these

questions, I want you to understand the situation, we're trying to get a thumbnail sketch.

A,. Yes, I understand that. Well, the cerebellum specifically is the name for it. It's a small brain and that's where it gets the name cerebellum. It's the structure of the brain that sits in the back of the head and overlies the brain stem and it's primary function, as we understand it, is to send signals to the rest of the nervous system helping to coordinate any body activity be it eye movement, hand movement, posture, walking. Whatever the activity might be, slight or major, it sends signals that enjoin with the primary signals that work these areas and the function is to coordinate

theses movements. So that people with cerebellum damage may present with imbalance, they may have trouble with abnormal movements of their body, this kind of thing, and since this is the area we're concerned about, the complaints he has of imbalance, the neurological findings of a wide base gait, mild ataxia, dysarthria, these functions are actually controlled through the cerebellum which is the coordination system of the brain.

Q. With regard to the terms that you use of dysarthria I didn't quite get the meaning of that term. Could you tell me what it was again?

A. Yes. Dysarthria is an inability to enunciate clearly. It can be

a slurred speech, this kind of thing, any kind of difficulty in actual physical production of the sounds, although the person can fully know what they want to say and understand what other people are saying.

Q. And hyperacusis?

A. Hyperacusis, right.

Q. How is that spelled?

A. H-y-p-e-r-a-c-u-s-i-s.

Q. What is that, sir?

A. That is where a person who hears a sound that other people around them would consider to be a normal, not difficult, damaging sound would hear it as being louder and more irritating in nature.

Q. So it's an enhancement of a normal sound, I suppose?

A. That's correct.

Q. And the other complaints you mention in your letter of June 27 in the second paragraph, chronic headaches, disorientation, dizziness.

MS. EPPS: Which exhibit are you referring to?

MR. SELKIN: The letter of June 27, I believe, which is your last exhibit.

THE WITNESS: My letter to him, to Mr. Selkin.

BY MR. SELKIN:

Q. With regard to that I think I understand those problems, but then in the next paragraph you speak of slow mentation. Could you tell me what slow mentation is?

A. Okay. This is someone who in the normal course of thinking about a matter if you pose a question to

them or a problem to solve that although they can do it it takes them more time than you would expect a normal adult with normal education to be able to do.

Q. You mean significantly more time?

A. Exactly.

Q. Even if it were something rudimentary such as tying a show lace or a tie?

A. Sure. In his case even in answering questions, a simple question, he kind of mulls it over in his mind. It's like he has to think, "Well, how am I going to answer this?", and then he brings it out. So it's noticeable that he's slow in this one respect.

Q. Is he also slow not only before he answers, but is he slow in giving you the answer as he

actually enunciates the answer?

A. Again, that's the dysarthria. He does have dysarthria, yes.

Q. Now you then conclude that Mr. Norman did suffer some form of cerebellum brain stem injury as a result of his head injury and you go on to state that there will be -- it's unlikely there will be improvement. That some form of cerebellum brain stem injury seems to a layman as myself in the field of medicine to be a broad paint. Can you tell me exactly what you are saying? That may be it, but perhaps you can say it in another manner.

A. Yes. Well, it's a descriptive phraseology. Again, if I could say that part of the cerebellum was missing then I could say that was what we're seeing in Mr.

Norman is a symptom complex of multiple problems that are relatable to an area of the brain and that's the brains function of that area to coordinate speech and action and movement. So what I'm saying is although I can't tell you exactly what the injury is because I don't see it on the MR Scan, I can't give you specific nerve tracks and this kind of thing, all the same it makes sense to me that a cerebellum injury of some kind could certainly produce ataxia and imbalance, likewise, with the brain stem. I mean that's where the cerebellum communicates through the brain is through the brain stem.

His communication structure may have also been affected and,

as a matter of fact, the hearing mechanism comes out of the brain stem so, again, this might correlate with that. So although I cannot pinpoint a specific area, whereas in some conditions that have very specific names like olivopontocerebellar degeneration or something like that which is a type of brain stem deterioration which is a very specific problem, that would be a name, you know, I could give you a name, but this is a condition that I cannot give you specific actual nuclear elements that are involved, this kind of thing, yet the overall picture is one that would be compatible with an injury to this area.

Q., Are you saying doctor, that if there were a blow that caused a

coma to a patient and a blow occurring in this same area that Mr. Norman had that even though you did a MR Imaging you very well might not see psychological damage from the imaging?

A. It's possible, yes.

Q. So the form of cerebella brain stem injury, if I asked you what in the cerebellum is affected or whether it's affected by the nerves in the cerebellum or the vessels would you be able to tell us other than he did suffer some form of cerebella brain stem injury?

A. That's right. I cannot be more specific than that, although we are referred to neuroma and that is nerve function and not blood vessel function. With blood vessel function if a blood vessel

is cut off to a part of the brain then you get brain damage. There is an area of the brain missing.

Q. So we can safely say that you are referring to nerve damage to the cerebella brain stem injury. And your answer is?

A. Yes. We're referring to nerve involvement, yes.

Q. Now, doctor, we are sensitive to words in the legal profession and when we talk about "could have" and "may have" and "might have" as to opposed to the fourth paragraph where you indicate "did" I guess my question is taking the history of the patient and your examination of the patient and the tests that you've conducted and the observations you have made you have come to this conclusion in the fourth

paragraph that in your words, "Mr. Norman did suffer some form of cerebella brain stem injury"?

A. That's correct. That's my opinion.

Q. And that it has resulted in a long term disfunction in the coordination system of his nervous system?

A. That's correct.

Q. In the second sentence of that fourth paragraph he certainly from a functional standpoint has been severely affected by this injury?

A. That's correct.

Q. All right, sir. Now in moving to your letter or report of March 11, 1988, if you would. Do you have it there, doctor?

A. Yes, I do.

Q. And honing in on your last

paragraph of the last sentence, "In my opinion in the present state of this patient he is unfit for any kind of gainful employment". Is that your opinion?

A. Yes, it was. Based on that exam, yes, it was.

Q. And does it remain your opinion?

A. Yes, it does.

Q. All right. Based on your subsequent evaluation and everything else?

A. Yes.

Q. And we are talking about Bruce Norman and not just anyone who has been out of work for a year, are you not?

A. That's correct. This question was related to Mr. Norman. That's correct.

Q. And I recognize this will

probably involve reiteration, but we need it for purposes of this record. Can you tell me as best you're able for the underlying basis for your opinion that he is unfit for any kind of gainful employment?

A. Okay. The basis of that are twofold. One is the history I was given that he has been unable to work for seven years by himself and his wife and the multiple complaints that he has had for seven years of imbalance, difficulty coordinating activities, difficulty with his attention span, these kinds of things, that would have intervened from his ability to function. And my particular examination which did, indeed, show that he had problems with

slow mentation, dysarthria, ataxia, which are actually physical problems that he did have.

So there were complaints of him that have lasted for seven years and they have interfered even with his, you know, family life, let alone anything outside his house. In fact, I could demonstrate on the time of his visit in the office that these things did exist and it was my opinion that under those circumstances he certainly appeared to be unfit for work outside the house, gainful employment outside of the home.

Q. I guess my last question is, doctor, taking the history of his having a severe blow to the back of the head would you

characterize this type of damage to Mr. Norman causing this type of longstanding injury to be an unusual situation? I guess that's the best word I can come up with.

A. Well, no, I think his particular problem is somewhat unusual. But we frequently see injuries that lead to quadriplegia as leading from the neck down or permanent coma or death from work-related injuries so that we do see very severe injuries from a fall from a scaffolding or being hit by boards or pieces of equipment resulting in life-threatening and permanent damage to the nervous system.

Q. I want to deal with his blow.

A. His specific presentation of coordination and dysarthria and

whatnot are not common complaints. Most people have problems more with the upper part of the brain because it's a larger, more exposed, part of the brain. This area here at the back of the brain is less commonly directly injured by the type of injury he had. There's no question that if you get an injury back there that would be the type of problems people should have.

Q. I'm not sure I understand. If the blow had been to the top of the head, but the blow in this case as described was to the back of the neck?

A. Right. That should result in the kind of problems he's complaining about.

Q. I see. So when you say from a

normal standpoint, I take it, you're normally dealing with blows to the top of the skull?

A. Right. The changes of hitting a small area in the back versus the upper large part of your head is much greater, obviously it's easier to hit the upper part of your head, so the average person that we see that results in several neurological injury usually had some other kind of injury. But we see many patients with this problem, although they're the minority as far as the overall number of head injuries I have seen.

Q. And, I guess, dealing with the blow that he received to the back of the skull then I guess I have to ask you then assuming the blow to the back of the neck or skull,

where it was, with this air hose would that normally cause the type of injury to the cerebellum that you described?

A. Right. If it was severe enough it could result in that type of injury, sure.

EXPERT CREDENTIALS OF JOHN L. GRANT, M.D.

1. Premedical:

John Carroll University,

Cleveland, Ohio, B.S. 1970.

2. Medical: Ohio State University, College of Medicine, M.D. 1975.

3. Internship: Surgical, Shands Teaching Hospital, Gainesville, Florida, 1975 - 1976.

4. Residency: Assistant, Resident, Neurological Surgery, Shands Teaching Hospital, Gainesville, Florida, 1976 - 1979.

5. Certification: National Board of Medical Examiners, 1976. American Board of Neurological Surgery.

6. Licensed to Practice:

Florida

Virginia

North Carolina

7. Societies:

Alpha Omega Alpha

Nu Sigma Nu

FMA and AMA

Congress of Neurological Surgeons

American Association of Neurological Surgeons

American College of Surgeons

8. Research Activities:

Microsurgical Anatomy:

(1) The Anatomical Relationship Between the Anterior Inferior Cerebellar Artery and the VIIth and VIIIth Cranial Nerves, Surgical Forum, October 1979.

(2) Microsurgical Relationships of the Anterior Inferior Cerebellar Artery and the Facial-Vestibular Nerve Complex, Neurosurgery, 6 (5), May 1980.

Center Psychiatrists

October 1, 1986

White & Selkin
Attorneys at Law
1110 United Virginia Bank Bldg.
Five Main Plaza East
Norfolk, Virginia 23510

Attn: Robert M. White

Re: Norman, Bruce E.

Dear Mr. White:

I am in receipt of your letter of September 26, 1986.

It is my professional opinion that Mr. Norman was and is totally disabled at this time. I have indicated in my reports to Mutual of Omaha that patient has been totally disabled from September, 1985 through the present. I would be most happy to send you copies of these reports if they would assist you in helping Mr. Norman.

Please let me know if you need any further information or clarification.

Sincerely,

/s/ E. Daniel Kay, Jr., M.D.

EDK:lyn

4037 Taylor Road, Suite A1,
Chesapeake, Virginia 23321
804-483-6350

Center Psychiatrists

January 12, 1987

White & Selkin
Attorneys at Law
1110 United Virginia Bank Bldg.
5 Main Plaza East
Norfolk, Virginia 23510

Attn: Albert C. Selkin

Re: Norman, Bruce

Dear Mr. Selkin:

Enclosed with this letter you will find copies of information that I sent to the Social Security office when I was requested to provide information for them. In addition to that, I am sure you have the letters which are included with this packet which were addressed to your associate initially. At this point, I would like to review Mr. Norman's history briefly and discuss his condition.

Following what turned out to be a rather significant, industrial injury on his employment a number of years

ago, Mr. Norman has been through multiple evaluations including neurological, orthopedic, and medical. He was initially referred to me because he had an unremitting pain problem which had not been responsive to multiple numbers of medications in the past and had been totally disabled from work from February until October of 1982, and had been completely disabled and unable to return to work since the middle of September 1985. It was notes that he had tried all available jobs at his previous employment situation and had been unable to tolerate any of those without significant increase in symptoms and deterioration in his condition.

I initially saw Mr. Norman in February of 1986, as is outlined in the letter. He has been regular in

pursuing treatment and returning for his appointments since that time and in spite of multiple medications, including significant doses of antidepressants which have had a tendency to reduce pain in many people, Mr. Norman continues to show deterioration and inability to function. The symptomatology, rather than being helped in any way, appears to be increasingly steadily but slowly.

Mr. Norman's current condition is such that any movement produces significant increase in his headache symptoms. He is unable to turn his head from side to side and has the same reaction to loud noises, constantly being bothered by a ringing and roaring in his ears ("tinnitus") and some weakness of his left leg. I have tried to, in the process of

treatment, get Mr. Norman engaged in some recreational activities. He has tried, but has found that he cannot tolerate such simple actions such a fishing or rides in automobiles.

While Mr. Norman continues to be significantly depressed, he also has marked physical symptoms which limit his mobility and tolerance. Frustrations in attempting to secure at least some sort of future for himself have aggravated the condition so that the depression has worsened. He has become totally socially isolated and withdrawn, very rarely making contact with other people except those in his direct family. He has become rather reclusive, having to remain at home most of the time. He has not been capable of indulging in hobbies or any other interests because of poor concentration and his life-

style is quite different than his premorbid condition.

Mental Status: Though Mr. Norman does not possess any formalized delusional systems or psychotic thought disorders, the degree of depression, with psychomotor retardation, increased irritability and sensitivity, and the unresponsiveness to medications and treatment, is significant. He tends to view the world in a somewhat paranoid and referential way, although not to psychotic proportions. His talk, though sparse, is relevant, coherent, consistent, and logical. No flight of ideas or looseness of associations are noted. Mr. Norman does not hallucinate. He is oriented in all four spheres, and his memory, though diminished in overall quality, is adequate. His attention span and

concentration are quite diminished, however, so that a great deal of effort is required for him to retain things.

Diagnoses: Major Depression, Single Episode, with Melancholia; Dysthymic Disorder. Axis II: Mixed Personality Features. Axis III: Chronic Pain Syndrome.

Prognosis: Mr. Norman has been through several years of treatment, multiple medications, multiple procedures to help alleviate his distress and pain including neurological procedures and treatment, and his response has been quite disappointing. In all likelihood, Mr. Norman's condition is chronic and though it may fluctuate mildly from day-to-day or month-to-month, the prognosis for any significant improvement to the point that he could

function in a more adequate fashion, is quite poor.

In any foreseeable way that Mr. Norman might attempt it, I cannot see him as being capable of any form of employment. With the social isolation, reduced concentration, energy, and interest, his sensitivity to stress, inability to tolerate noise, movement, or even recreational activities which are mild and nonstressful, Mr. Norman's ability to enter into a work environment or to sustain himself in any fashion is nonexistent. I, therefore, appreciate any help you can give Mr. Norman is pursuing his cause before the Social Security Administration as I do feel their denial of benefits was in error and based upon inadequate documentation of his actual condition rather than a misinterpretation of it.

Any help I can provide with documentation will be gladly done.

Sincerely,

/s/ E. Daniel Kay, Jr., M.D.

EDK:lyn

Enclosures

4037 Taylor Road, Suite A1,
Chesapeake, Virginia 23321
804-483-6350

Offices: Portsmouth, Norfolk, Virginia Beach and Chesapeake

Center Psychiatrists

May 25, 1988

White & Selkin
Attorneys at Law
1110 Crestar Bank Building
5 Main Plaza East
Norfolk, Virginia 23510

Attn: Albert C. Selkin

Re: Norman, Bruce E.

Dear Mr. Selkin:

Enclosed with this letter please find copies of letters I wrote to Dr. John Grant and copies of his response upon his seeing Mr. Bruce Norman. Recently, we have been trying some of the recommendations Dr. Grant made and have used Periactin which produced significant problems for Mr. Norman in producing a "pins and needles-like feeling" in his arms and legs and had to be discontinued. On May 3rd, I started him on Dilantin three times a day for three weeks. Upon reevaluation, he reports no

significant benefit to the pain from the Dilantin, but does report some sedation. I had checked his Dilantin level to make sure that it was adequate and not excessive. It appears the Dilantin is providing no clinical benefit to him. We will therefore try Tegretol to see if some relief can be obtained with less sedation and problem.

Mr. Norman has continued to regularly come to the office for follow-up appointments. He has continued to have significant pain, intolerance to noise, stress, or much physical motion. He continues to be somewhat despondent in spite of adequate levels and doses of antidepressants and requires a fair amount of analgesia to function even at the minimal and withdrawn level that he does function.

An overall view of the situation, given the MRI scan findings and the location of his problem, suggests that his major difficulties do arise from an injury which he received while employed by VEPCO. The significant psychological difficulties, depression, and regression in his function, have been secondary to that. He has experienced a great deal of discomfort, both emotionally and physically, and has been unable to function in any meaningful capacity, including his responsibilities at home. Currently, Mr. Norman takes Desyrel (trazedone), 150 mg tablets, three at bedtime. He has also required Valium, 10 mg q.i.d. as well as a wide range of analgesics along with it, including Wygesic, Darvocet, and several others. He receives little benefit. Halcion, 1mg at

bedtime has been needed to help with his sleep in spite of the high doses of Desyrel. We are currently trying to find some other way to alleviate his pain and will be switching from Dilantin to Tegretol in order to try to find some relief without the significant side effects he is reporting from Dilantin.

I will be happy to discuss Mr. Norman's condition and prognosis with you at any time if you will contact me. In the meantime, we will be trying additional medications to try to provide as much comfort as possible and will try to keep you posted as to his progress.

Sincerely,

/s/ E. Daniel Kay, Jr., M.D.

EDK:lyn

Enclosures

4037 Taylor Road, Suite A1,
Chesapeake, Virginia 23321
804-483-6350

Offices: Portsmouth, Norfolk,
Virginia Beach and Chesapeake

EXPERT CREDENTIALS OF DR. E. DANIEL KAY, JR.

1. Medical: Duke University Medical Center.

2. Internship: Watts Hospital, in Durham, North Carolina.

3. Residency: John Umstead Hospital in Butner, North Carolina.

4. Board Eligible: Psychiatry and Geriatric Psychiatry.

5. Licensed to Practice:

Virginia

North Carolina

March 30, 1989

VIA EXPRESS MAIL

Mr. Albert C. Selkin, Esq.
White and Selkin
Norfolk Commerce Center III
5425 Robin Hood Road
Norfolk, Virginia 23513

Dear Mr. Selkin:

I am writing to inform you as Mr. Bruce Norman's representative that the Virginia Power and Disability Benefits Committee has considered Mr. Norman's application for total and permanent disability retirement benefits and has determined that Mr. Norman is not eligible for such benefits.

The following members of the Disability Benefits Committee reviewed Mr. Norman's application:

Mr. C. Max Bartholomew, Jr. - Manager - Compensation Services

Mrs. Deborah A. Geppert - Director - Benefit Administration

Mr. W. J. Hellems - Director - Employee Relations Services

Dr. D. E. Slagel - Medical Advisor

Dr. W. S. Dingledine - Medical Advisor

Mr. W. L. Claybrook - Manager - Customer Service and Marketing

After reviewing the information which you submitted on Mr. Norman's behalf and relevant information concerning his medical condition int eh Company files, the Committee has determined that Mr. Norman was not totally and permanently disabled while employed by the Company, as defined in Section 1.38 of the DRI Retirement Plan. Section 1.38 defines totally and permanently disabled as follows:

> ...a condition, determined on the basis of medical evidence satisfactory to a physician designated by the Administrator, rendering a Member, due to bodily injury or disease, unable to perform services as follows: (i) during the first two years of such disability (measured from the commencement of such disability rather than the commencement of benefit payments) such Member is unable to perform any and every duty pertaining to his employment by the Employer; and (ii) thereafter, such Member is unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience.

The Committee asked two physicians to conduct a review of Mr. Norman's medical records as well as all the material you submitted to the Committee, including Dr. Grant's and Dr. Kay's evaluations. Dr. Dingledine, who monitored Mr. Norman's medical condition while he worked for Virginia Power through written and

oral reports from the various physicians who examined him, as well as visiting him at his work site in 1983, found that at no time during the period July 7, 1981 to September 16, 1985, was there medical evidence that he was totally and permanently disabled. He found that all of Mr. Norman's symptoms were subjective, and several of his consulting physicians felt that he was attempting to manipulate his situation. He notes that Dr. F. Woodson, a psychiatrist who saw Mr. Norman regularly for over a two-year period while he was employed by the Company, diagnosed his complaints as an emotional problem.

Dr. D. E. Slagel also reviewed Mr. Norman's medical records. Dr. Slagel noted that Mr. Norman had a history of injuries while employed by the Company in which he took excessive lengths of

time for restricted duty and off duty. He found that the various physicians who examined Mr. Norman prior to 1986 -- Drs. Neil, Woodson, Dreifuss, Rice, Jensen, Kruger -- all agreed that there was no evidence of any physical problem. Dr. Brooks at the Tucker Psychiatric Institute felt the Mr. Norman's problem was not related to an accident but was the result of a character disorder. Dr. Woodson, who treated Mr. Norman for several years, through the end of 1985, continuously found that Mr. Norman was not disabled from working.

In regard to the reports of Dr. Kay and Dr. Grant submitted by Mr. Norman, Dr. Slagel found that Dr. Grant's opinion the Mr. Norman suffered some form of cerebellum brain stem injury resulting in a long-term dysfunction in the coordination system of his

nervous system was contradicted by the doctor's statement that Mr. Norman required no special long-term medical treatment. Dr. Slagel discounted the finding that Mr. Norman's physical symptoms as observed in 1988 could be related to a trauma suffered in 1981 since those same findings are indicative of the side effects of the medications which Mr. Norman was taking at the time Dr. Grant and Dr. Kay examined Mr. Norman.

Dr. Slagel also noted that the MRI results examined by Dr. Grant were normal with the MRI of the C-spine showing some mild degenerative changes. Dr. Grant did not feel that these were significant. Prior CT scans were also negative.

Dr. Slagel concluded:

> "Mr. Norman has come personality disorder traits as noted by frequent different examiners he had during his employment with Virginia Power. He has the propensity for injuries on the job, many of them requiring inordinate amounts of time off or at least on restricted duty. Several of them seem extremely inappropriate for the length of time that it took to get back to a recovered state. ... I strongly feel that the injury from the hose to the back of the neck is and should be a very self-limited kind of an injury, not one that is going to go on for years and years. The patient's slow mentation, indistinct speech, mildly wide-based gait, I believe, are not a result of any trauma, but more likely the side effects of the combinations of medications he had been on. During this time, I do not see any reason that Mr. Norman would be considered totally and permanently disabled from work, and it is my assessment that he should be denied benefits. ..."

Based upon the recommendations of Drs. Slagel and Dingledine, as well as the Disability Benefit Committee's own

review of the relevant information regarding Mr. Norman's job performance and medical history while employed by the Company and the information which you asked the Committee to consider, the Committee determined that Mr. Norman is ineligible for a disability retirement allowance under Section 5.01 of the DRI Retirement Plan. Section 5.01 requires that a Plan member be "determined to be Totally and Permanently Disabled while employed by an Employer."

Mr. Norman or you, acting as his duly authorized representative, may appeal this decision in writing to the Administration Benefit Committee within sixty days of receipt of this letter. The appeal should state the reason for appealing the claim. The appeal procedures are described in the DRI Retirement Plan (pp. 81-82) and

the Summary Plan Description ("If A Claim Is Denied"), which have been provided to you. If you have any questions concerning this determination, please write Mrs. Deborah A. Geppert, Director of Benefits Administration, Virginia Power, One James River Plaza - 16th Floor, Richmond, Virginia 23219. Should Mr. Norman decide to appeal this determination, the appeal should also be directed to Mrs. Geppert.

A copy of this letter has been sent to Mr. Norman via Express Mail.

Sincerely yours,

/s/ C. Max Bartholomew, Jr.
C. Max Bartholomew, Jr.
Manager-Compensation Services

cc: Mr. Bruce E. Norman
(via Express Mail)

July 10, 1989

Albert C. Selkin, Esq.
White and Selkin
Norfolk Commerce Center III
5425 Robin Hood Road
Norfolk, Virginia 23513

Dear Mr. Selkin:

I am writing to inform you as Mr. Bruce E. Norman's attorney that on June 15, 1989, the Administrative Benefit Committee considered Mr. Norman's appeal of the Disability Benefit Committee's decision that Mr. Norman was not eligible for disability benefits. The Administrative Benefit Committee has also determined that Mr. Norman is not eligible for such benefits.

The following members of the Administrative Benefit Committee considered Mr. Norman's appeal:

Mr. C. Max Bartholomew, Jr. Manager, Compensation Services (Present but not voting)

Mr. John G. Barrie, Jr. Assistant Corporate Secretary

Mr. B. D. Johnson Vice President and Controller

Mr. H. A. Keever, Jr. Vice President, Human Resources

Mr. Linwood R. Robertson Vice President, Treasurer and Corporate Secretary

The Committee reviewed the information submitted in your letter of appeal as well as the options of the Company's medical advisors. The Committee also had available to it all relevant information concerning Mr. Norman's

medical condition in the Company's files, his personnel records, letters submitted by Mr. Norman's doctors as well as the depositions of Drs. Grant and Kay and Mrs. Norman.

After careful consideration of the information submitted, and a question and answer period with Drs. Dingledine and Slagel, the Committee upheld the earlier decision of the Disability Committee. In their opinion, Mr. Norman was not Totally and Permanently Disabled (as defined by Section 1.38 of the Plan) while employed.

Sincerely,

Deborah A. Geppert
Director-
Benefit Administration

cc: Mr. Bruce E. Norman
(Via Certified Mail)

DEPARTMENT OF
HEALTH OF HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

NOTE TO PROCESSING CENTER:
FURTHER ACTION NECESSARY

Name and Address of Claimant:

Bruce Norman
5941 Brenda Avenue
Norfolk, VA 23502

NOTICE OF FAVORABLE DECISION - PLEASE READ CAREFULLY

This Decision Is Favorable to You

Another office will process the decision. You will receive a notice from that office.

Your local Social Security office or another office may ask you to give more information before you receive the notice. If so, please answer promptly.

If you hear nothing about this decision for 60 days, please contact your local Social Security office.

If You Think the Decision is Wrong

You have the right to appeal. You must file your appeal within 60 days from the date you receive this notice. (It will be presumed that you received the notice within 5 days after the date shown below, unless you show us that you did not receive it within the 5-day period).

When you appeal, you request the Appeals Council to review the decision. If the Appeals Council grants your request, it will review the entire record in your case. It will review those parts of the decision which you think are wrong. It will also review those parts which you think are correct and may make them unfavorable or less favorable to you. You will receive a new decision.

You (or your representative) have to ask for the appeal in writing. You may sign a form HA-520, called

"Request for Review by the Appeals Council," or write a letter.

You may submit your appeal to your local Social Security office, a hearing office, or mail it directly to the Appeals Council, Office of Hearings and Appeals, P. O. Box 3200, Arlington, VA 22203.

The Appeals Council May Review the Decision on Its Own Motion

Within 60 days from the date shown below, the Appeals Council may review the decision on its own motion. This could change the decision.

After the 60-day period, the Appeals Council may reopen and revise the decision in certain situations.

The Appeals Council will notify you if it decides to review the decision on its own motion, you may not obtain a court review of your case

(sections 205(g), 1631(c)(3) or 1869(b) of the Social Security Act).

This notice and enclosed copy of decision mailed September 28, 1987.

cc:

Name and Address of Representative

Albert Selkin, Esquire
1110 United Virginia Bank Building
Norfolk, VA 23510

NOTE TO PROCESSING CENTER:
FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF:

Bruce E. Norman
(Claimant)

_____
(Wage Earner)

CLAIM FOR:

Period of Disability and
Disability Insurance Benefits

227-50-9807
(Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUED

The general issues are whether the claimant is entitled to a period of disability and disability insurance

benefits under sections 216(i) and 223 of the Social Security Act, as amended, respectively. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement.

APPLICABLE REGULATIONS

Pursuant to the Act, the Secretary has established Social Security Administration Regulations No. 4. The

regulations provide steps for evaluating disability (20 CFR 404.1520(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.

Social Security Administration Regulations No. 4 requires the Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b));

2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c));

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1" of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520 (d));

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e));

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past

work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional capacity (20 CFR 404.1545). If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability." In cases where the individual has solely a nonexertional impairment, a determination as to whether disability

exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

The evaluation process described above applies to both physical and mental impairments. In addition, the regulations require the Administrative Law Judge to follow a special procedure when evaluating the severity of mental impairments. This special procedure requires the use of the form appended to this decision in all cases in which a mental impairment has been found to exist (20 CFR 404.1520a).

The form is used to list the signs, symptoms and other medical findings which establish the existence of the

mental impairment. The medical findings are recorded in one or more subsections in section III of the form. These subsections correspond to the paragraph A criteria for the categories of mental disorders in Appendix 1 of Subpart P, Regulations No. 4, and are known as the "A criteria.

The form is also used to rate the degree of functional loss resulting from the documented mental impairment(s). There are four areas of function which have been found especially relevant to the ability to work and which correspond to the paragraph B criteria of most of the mental disorders listed in Appendix 1; hence, they are known as the "B" criteria. These areas are: activities of daily living; social

functioning; concentration, persistence and pace; and deterioration or decompensation in work or work-like settings. The rating for each of these four areas is compared with the criteria set forth in the regulations for determining the severity of the mental impairment.

SUMMARY AND EVALUATION OF THE EVIDENCE

The claimant filed an application for disability insurance benefits on August 14, 1986, alleging and onset of disability as of September 13, 1985, due to a "head injury." His application was denied in determinations made at the initial and reconsideration levels whereupon the claimant filed a request for hearing on December 16, 1986. The claimant and his attorney, Albert Selkins, appeared and participated at a hearing

held in Norfolk, Virginia, on July 23, 1987. Testimony was also taken from Cynthia Norman, Ray Moyer, Sarah Conley, and David Kay, M.D., witnesses for the claimant, as well as from Wendell Pile, M.D., a medical advisor, and E. Davis Martin, Jr., Ed.D., a vocational expert.

The claimant was hospitalized in December 1981 for evaluation of headaches secondary to a blow to the back of the head experienced in July 1981. Subsequent to his injury he had complained of headaches, vomiting, nausea, and tinnitus. On neurological evaluation had a positive drift sign in the left upper extremity and some very mild weakness of both left upper and lower extremities. There was decreased sensation to pinprick and light touch of the left upper and

lower extremities but the rest of his examination was essentially within normal limits. A brain scan showed no localized abnormalities but an anti-nuclear antibody test was positive at 1:80 with a speckled pattern. An electroencephalogram was negative. The claimant's headaches were not relieved with the use of medication and he was discharged with a diagnosis of headaches of unknown etiology, possibly post traumatic (Exhibit 19).

The claimant continued to exhibit problems with severe headaches, nausea and vomiting which did not respond to multiple trials of analgesics and psychtropic medications (Exhibits 20, 25). He underwent various psychological and psychiatric evaluations which revealed significant psychological distress characterized

by anxiety and depression, a focusing on somatic complaints, disruption of thoughts, defensiveness, and possible suicidal ideation (Exhibit 28). Although at other times he exhibited no signs of a formal thought disorder, delusions or hallucinations and was not felt to have an obvious mental disorder (Exhibit 23). It was opined that the claimant was unable tow work (Exhibits 20, 21).

Records and reports from Frederick G. Woodson, M.D., a psychiatrist and neurologist, reveal that he began treating the claimant in 1982 and continued to treat him until November 1985. He described the claimant as complaining incessantly of constant headaches, tinnitus, irritability, nausea, and an inability to tolerate

stress or noise. It was reported that he complained of being assigned to a clerical job which he did not feel he was capable of performing. Dr. Woodson assessed that his treatment through psychotherapeutic means was a failure except for minor degrees of improvement. He opined that the claimant had elements of a character disorder as well as some neurotic thinking and behavior. He felt the claimant had "a combination of conscious and unconscious forces at play" which result in the claimant's seeing himself as handicapped by work injury and believing that he required indefinite care. In March 1986 Dr. Woodson assessed that the claimant had poor prognosis for improvement and would likely continue to have many symptoms and would be unable to perform his duties (Exhibits 26, 27, 28).

E. Daniel Kay, Jr., M.D., a psychiatrist, reported that he first began treating the claimant in February 1986. He described the claimant as constantly complaining of discomfort, tinnitus and nausea as well as having problem with decreased energy and depression. In January 1987 Dr. Kay disclosed that ny movement produced significant increase in the claimant's headache symptoms and that he was unable to turn his head from side to side and that loud noises caused the same reaction. He also described being bothered by ringing and roaring in his ears and some weakness of his left leg. Dr. Kay notes that the claimant had "marked physical symptoms which limit his mobility and tolerance." He described the claimant as becoming totally socially isolated and

withdrawn, other than for contact with his direct family. He disclosed the presence of a degree of depression with psychomotor retardation, increased irritability and sensitivity. He felt the claimant viewed the world in a somewhat paranoid and referential way and had a quite diminished attention span and concentration (Exhibits 29, 33, 42).

At the hearing the claimant testified that he was 46 years old and had an 8th grade education. He reported having worked as a boiler operator for an electric company. He confirmed that he had been injured when he was struck on the head by a pressurized hose and indicted that since that time he had experienced much pain and sickness. He noted that he was fired because he was unable to maintain work

when his company tried to put him to work as a "gopher" doing tasks such as clerical work and sharpening pencils. He described having constant pain which makes him feel like he is going to "throw up." He indicated that any excitement or noise exacerbates this problem so that he has to wear ear plugs to reduce his headaches. He stated that he tried to go fishing on three occasions but the excitement made his headache more severe. He also disclosed that if he bends over he sometime falls down. He stated that he was capable of taking care of his personal needs but other than that limited his day to staying around his house. He described himself as being physically active prior to his accident.

Dr. Kay testified that he had been treating the claimant for approximately two years during which time he had had continuous pain and difficulty. He notes that the claimant had been tried on multiple medications and various workups without success and confirmed that any excitement causes an increase in the claimant's pain. He described the claimant as leading a restricted lifestyle and as being unable to be exposed to any stress. Dr. Kay described the claimant as being hypersensitive to noise or visual stimuli. He notes that the claimant had been treated with narcotics, pain relievers, and anti-depressants without success although the claimant was on medications to help him sleep at night. He indicated that the claimant had always been a very

physical individual and not very intellectual and was now frustrated by his physical restrictions. He noted that subtle neurological changes cannot always be picked up on testing and, even though the tests had not shown any definitive problem, he felt that there was some physical basis to the claimant's difficulties as well as his emotional problems. Dr. Kay was of the opinion that the claimant could not concentrate, stoop, stand, walk, sit in one position, think, read, or stand noise. Dr. Kay opined that the claimant was moderately restricted as far as daily activities and social functioning and severely restricted in his ability to concentrate. He felt that it was out of the question that the claimant would be able to maintain regular attendance and punctuality, work around others or noise, or deal with a work setting.

Cynthia Norman, Sarah Coney, and Ray Moyer testified that the claimant is no longer active. They described him as having been a physical person in the past engaging in sports and physical activities and indicate that he is unable to engage in such tasks now or be around any excitement. They described his lifestyle as being significant decreased.

Wendell Pile, M.D., a psychiatric medical advisor, testified that the claimant's medical history indicated that he had had several diagnoses. Dr. Pile opined that the opinions expressed by Dr. Kay did not agree with his since there was no finding of any neurological abnormalities and he did not think the claimant experienced organic factors. He assessed that the claimant had a passive/dependent

personality disorder with persistent disturbances of mood. He felt that the claimant was moderately restricted in activities of daily living, had slight difficulty maintaining social functioning, and showed no significant decrease in concentration, and thee was no evidence of deterioration or decompensation in a work and worklike setting. Dr. Pile indicated that the treatment performed by Drs. Woodson and Kay had not resulted in any improvement in his symptomatology and he felt this was indicative of a characterological disorder. He opined that the claimant restricted himself secondary to the characterological problems and noted that he had a very poor prognosis as far as any improvement in his condition.

E. David Martin, Ed.D., a vocational expert, testified that if the

claimant's testimony were accepted as being accurate he could not be expected to engage in any work. Dr. Martin also felt that if Dr. Kay's or Dr. Pile's testimony was accepted, then the claimant still could not engage in any substantial gainful activity.

The claimant has not engaged in substantial gainful activity since his alleged onset of disability. He has a characterological disorder which has been exacerbated by a traumatic injury. However, he does not have an impairment or combination of impairments which meet or equal the criteria for disability as set forth in the Listing of Impairments contained in Appendix 1, Subpart P, Regulations No. 4.

The claimant's characterological

disorder has to be evaluated under Section 12.08 of the Listing of Impairments, which deals with personality disorders. This section is divided into two parts. Part A sets forth the signs and symptoms which must be objectively established, while Part B deals with the resulting functional limitations. The record shows a six-year history of inflexible and maladaptive personality traits which have resulted in significant impairment in the claimant's occupational functioning as exhibited by persistent disturbances of mood with constant depression and anxiety. Therefore, he satisfies the "A" criteria of Section 12.08. However, he does not satisfy the "B" criteria. If activities of daily living are only moderately restricted since he remains

capable of maintaining his own person hygiene, driving a car for short distances, and engaging in activities which are not exciting or quiet. While he has significantly restricted his interaction with other people outside of his family, the undersigned is persuaded that his ability to maintain social functioning is only slightly limited since he relates well to others and is capable of communicating effectively. The claimant has complained of constant headaches for a prolonged period of time so it felt that he would often be subject to deficiencies of concentration, persistence or pace. The record shows no indication of episodes of deterioration or decompensation in work or worklike settings. Since the claimant does not satisfy any of the "B" criteria of

Section 12.08, the undersigned concludes that he does not meet or equal the criteria for disability as set forth in the said section.

The claimant's ability to engage in exertional activities on any level is substantially diminished by his nonexertional limitations of function. While the etiology of the claimant's problems have remained unresolved, the medical evidence establishes that he has a long history of treatment for headaches, nausea, vomiting, tinnitus, and depression. These problems originally manifested themselves after the claimant was involved in an industrial accident although there has been no physiological or neurological basis found for these problems. His treating psychiatrists, Drs. Woodson and Kay, have disagreed as to the

cause of this problem but both agree that the claimant's symptoms doe exist. This was confirmed by the testimony of the medical advisor, Dr. Pile. Whether or not thee is a physical basis for the claimant's symptoms does not in any way affect the resulting limitations arising from the claimant's problem. The record has established that the claimant is unable to tolerate excitement, stress, noise, or movement without experiencing an increase in pain and nausea. Furthermore, he cannot tolerate being around others because of noise and an inability to follow more than one conversation at a time. The testimony of the witnesses at the hearing indicate that the claimant, when exposed to excitement or noise, has to lie down in an effort to obtain relief of his symptoms. This could

not be tolerated in a normal working environment. Furthermore, the record shows that the claimant has undergone approximately six years of treatment for these problems without any significant success being obtained. Therefore, the undersigned is persuaded that the claimant's ability to work on any exertional level has been substantially diminished by his multiple nonexertional limitations of function.

The sequential evaluation process now requires that a determination be made with regards tot he claimant's ability to return to his past relevant work. The record shows that the claimant worked as a boiler operator, While this work was essentially sedentary in nature, it did involve working around constant noise, required prolonged

concentration, and would not allow for rest periods throughout the day. Given the severity of the claimant's current functional limitations, it is obvious that he is no longer able to return to his former job.

Consideration must now be given to the claimant's ability to make a successful adjustment to other work which exists in significant numbers in the national economy. The record shown that he is 46 years old or a "younger individual." He completed the 9th grade as his education is considered "limited." His past work experience was semi-skilled. Considering the claimant's age, education, past work, and nonexertional limitations of function, he could not be expected to make a successful adjustment to work which

exists in significant numbers in the national economy. This was confirmed in the assessment of the vocational expert. Therefore, the claimant has been "disabled" within the meaning of the Social Security Act, as amended, at all times since September 13, 1985.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on September 13, 1985, the date the claimant stated he became unable to work, and continues to meet them through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since his alleged onset of disability.

3. The medical evidence establishes that the claimant has a

severe characterological disorder, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The testimony regarding the severity of the claimant's symptoms and the resulting functional limitations is credible and corroborated by the objective medical evidence of record.

5. The claimant has the residual functional capacity to perform the nonexertional requirements of work except for prolonged standing, walking, sitting, repetitive lifting, bending, stooping, engaging in any activities which would expose him to noise, excitement or stress, maintain concentration and attention, or work where he cannot lie down as needed (20 CFR 404.1545).

6. The claimant is unable to perform his past relevant work as a boiler operator.

7. The claimant is 46 years old, which is defined as a "younger individual" (20 CFR 404.1563).

8. The claimant has a "limited" education (20 CFR 404.1564).

9. The claimant does not have any acquired work skills which are transferable to the skilled or semi-skilled work activities of other work (20 CFR 404.1568).

10. The claimant's capacity to work at all exertional levels is significantly compromised by his nonexertional limitations of function.

11. Considering the types of work which the claimant is functionally capable of performing in combination with his age, education, and work experience, he cannot be expected to make a vocational

adjustment to work which exists in significant numbers in the national economy.

12. The claimant has been under a "disability," as defined in the Social Security Act, since September 13, 1985 (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administration Law Judge that, based on the application filed on August 14, 1986, the claimant is entitled to a period of disability commencing September 13, 1985 and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ Philip T. Brown
Administrative Law Judge
Office of Hearings and Appeals
Room 736, Federal Building
200 Granby Mall
Norfolk, VA 23510

September 28, 1987
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

BRUCE E. NORMAN,

Plaintiff,

v. Civil Action No. 88-103-N

VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a VIRGINIA POWER,

Defendant.

AFFIDAVIT OF BRUCE E. NORMAN

NOTE: REFERENCES IN NORMAN'S AFFIDAVIT ARE TO ORIGINAL DISTRICT COURT EXHIBITS.

I, Bruce E. Norman (hereafter Norman), under oath state the following regarding Virginia Electric and Power Company (hereafter Vepco) and my suit for disability benefits:

1. On July 8, 1981, at 9:40 p.m. at night, I was injured by a thick heavy-duty hose containing a charged quantity of air pressure at a force of 90 - 95 pounds per square inch, which hose broke loose and

struck me, a tremendous blow directly against the back of the top of my neck at the base of my head.

I was thrown a considerable distance and a large welt appeared on the back of my neck. I experienced a severe headache, bright dots in my vision, and my hearing kept increasing and decreasing. I came home, could not sleep, kept vomiting, and telephoned Vepco at about 4:00 a.m., July 9, 1988, that I must get medical treatment but tried again to get some sleep. At 5:00 a.m., I called Vepco again. At 6:00 a.m. a Vepco employee took me to Leigh Memorial Hospital emergency room. (See Norman's Diary pages 1 - 2, Exhibit A)

2. I saw a number of physicians over the ensuing months which soon became years. My symptoms were, as a result of this injury:

a. a constant "locust" sound in both ears;

b. a severe headache that has never left since the accident;

c. if I attempt any exertion, the headache increases in pain and also brings on nausea and vomiting;

d. intolerance of noise;

e. left side numbness;

f. inability to engage in any employable work although, believe me, I tried and tried. The physicians in 1982 called my medical problem post-traumatic neurosis syndrome. (See Dr. Woodson's report dated February 4, 1985, being Vepco's Exhibit entitled "Dingledine O" labeled by Norman as "B"; UVA's Dr. Dreifuss report dated April 14, 1982, being labeled by Vepco as Dingledine "D", and labeled by Norman as "C"; Dr. Dreifuss report

dated May 14, 1982, labeled "D"; Dr. Marcus C. Rice report dated May 4, 1982, labeled "E")

3. I returned to work July 23, 1981, but was unable to work at the steam turbine position, my regular position, because of my headaches and the heightened noise, as it sounded to me, the nausea, and, as a result, Vepco took me off the steam turbines and put me on as boiler assistant. But the headache, nausea continued and increased and I had to rest rather than work. (See Exhibit F, Norman's Diary, page 4)

4. I tried as best I could to work but cold not. On July 27, 1981, Vepco took me to see Dr. Gross, who recommended a neurologist. At work headaches and noise and nausea continued. (See Exhibit G, Norman's Diary, page 5)

5. I was taken to see Dr. Marcus Rice, a neurologist on August 3, 1981. Vepco then placed me on light duty. Dr. Rice required I work in a "noiseless area" and I was given medication; Dr. Rice refers to duty as "selective duty". (See Dr. Rice's recommendation - Exhibit H; see Norman's Diary, page 6 - Exhibit I)

6. I was just unable to do any real work - selective or not - although I tried. (Norman's Diary, Exhibit J)

7. I continued to see Dr. Rice without any success in ridding me of these horrible symptoms. (See Dr. Rice office notes, Exhibit K)

8. Dr. Rice hospitalized me December 1, 1981, through December 7, 1981, but could not alleviate my symptoms. (See Leigh Memorial Admission and Discharge Exhibit L)

9. I saw Dr. Rice thereafter and was referred to Dr. Richard Neal for evaluation. Dr. Rice wanted me to see a psychiatrist, which I did not want to do. (See Dr. Rice office note - Exhibit M)

10. I was placed back on selective duty in a "noise free environment" by Dr. Rice on January 11, 1982. (See Selective Duty Report, Exhibit N of Dr. Rice)

11. I was sent by Vepco to see Dr. Richard Neal for an independent neurological exam. Dr. Neal, although he determined my disability to be unrelated to my on-job injury, did find that I was disabled (see Dr. Neal's reports labeled Exhibits "O" and "P"), Exhibit "P" being in response to Norman's letter (Exhibit "Q") to Dr. Neal.

Dr. Neal told me that there was definitely something wrong with me. (see Exhibits "Q" and "R")

12. Although Dr. Neal told me I was disabled, Vepco on February 16, 1982, told me that Dr. Neal had cleared me to return to regular duty, which I later learned was untrue. (See Dr. Neal's reports, Exhibits "O" and "P" and compare with Norman's Diary, Exhibit "S") I returned to work at the boiler plant, although I tried to contact Dr. Rice to help me because of the intense pain. Dr. Neal had told me that I was disabled and Vepco told me Dr. Neal said I'm fit for duty. At 10:00 a.m. February 16, 1988, the noise caused my headache to increase and the vomiting and pain continued. I was shaking all over but lasted the day. (See Norman's Diary - page 25 - Exhibit "S")

13. Dr. Neal had told me to return to the care of Dr. Marcus Rice. (See Dr. Neal's report - Exhibit "O" - and Dr. Neal's instructions - Exhibit "T")

14. Nevertheless, Vepco put me back to work, despite the report of Dr. Neal that I was unable to work and despite the fact that Vepco had me under the care of Dr. Marcus Rice.

15. I went to work the following day, February 17, 1982, but the headache I came to work with, increased due to the noise at the boiler board. I had to leave and requested to be permitted to use my sick leave. This was granted. I had to stay home the next two (2) days as well. (See Norman's Diary, Exhibit T)

16. On the following day, February 19, 1982, I received a letter dated February 16, 1982, from Dr. Marcus Rice again reiterating my

inability to perform my regular job as a boiler operator due to "post-traumatic headaches with nausea and vomiting". (Exhibit "U")

17. Vepco, on February 23, 1982, told me that since it was self-insured, I would not receive any more workmen's compensation and would have to take my case to the Virginia Industrial Commission. (See Norman's Diary Exhibit "V"

Since I could not work, which Dr. Rice (and later, I learned, Dr. Neal, as well) verified, I asked Vepco how many days of sick leave I had on the books. Vepco told me I had seven hundred and eight-four (784) hours, which amounted to ninety-eight (98) days. (See Norman's Diary, Exhibit "V")

18. I had that much sick leave because, before the accident, I was rarely sick and had been an employee

with Vepco for about seventeen (17) years, at the time of the accident. (Exhibit X - 1st page)

19. Dr. Marcus Rice, from February 17, 1982, through August 3, 1982, treated me and I remained disabled. (Dr. Rice report dated March 4, 1983, Exhibit W)

20. During this period, on June 21, 1982, the Industrial Commission heard and decided that I was disabled from work due to the pst-traumatic neurosis and this decision was upheld on review on September 28, 1982. (Industrial Commission opinions - Exhibits "X" and "Y")

21. Dr. F. G. Woodson, a psychiatrist, began treating me on August 3, 1982, because Dr. Marcus Rice advised that post-traumatic neurosis should be handled by a psychiatrist. (See Dr. Rice report dated December 28, 1982, - Exhibit

"Z") Dr. Woodson advised I was totally disabled. (See Dr. Woodson Exhibit "AA" dated September 3, 1982, undated, and November 12, 1982).

22. After the Industrial Commission review decision of September 28, 1982, was received by Vepco, which attested to my total disability, Vepco contacted me and said that it did have selective employment after all. Vepco no longer insisted I could return to regular duty, as it had insisted back in February 1982. (See Vepco letter dated October 15, 1982, - Exhibit BB) My attorney, Henry E. Howell, encouraged me to try. (see Exhibit CC)

23. On October 25, 1982, I returned to work on selective duty and was put to work sorting blueprints but my continuous headache increased, causing nausea. Although I was given two (2) breaks, I could no longer take

the pain and had to go home to take medication to put me to sleep. (See Norman's Diary - page 47 - Exhibit DD)

24. The next day the headache pain again stopped me from working. I wrote a letter to Mr. Berry, President of Vepco, to help me. The pain of headache and nausea is unbearable. (See Norman's letter to Vepco dated October 26, 1982, Exhibit EE)

25. On October 28, 1982, I reported to work with headache, nausea and ears filled with a locust sound. I did my best and Mr. Whitaker joined Mr. Ashley and said they would try to find me a selective duty job I could do.

I wanted to work but had to have a noise free area so my head would not hurt so much. I told them I would give it my best.

The next day Mr. Ashley had me inventory furniture, but I was still sick.

26. To sum it up, over the next year, I was used to do anything that was of little use because they recognized I was unable to do any meaningful work due to the pain. (See Norman's Diary - pages 48 - 76 - Exhibit FF)

27. I was carried as a boiler operator and receiving pay as such although I was on selective duty. On November 30, 1983, Mr. Whitaker advised me: (a) I would be working for him as a clerk and (b) I would be removed from selective duty and place on regular duty. I told him I would do my best to perform. (See Norman's Diary, Exhibit GG)

28. On December 2, 1983, Vepco's Mr. Wells took me to see Dr. Woodson but Dr. Woodson did not say anything

about my being taken off selective duty. (See Exhibit GG)

29. On December 7, 1983, Mr. Whitaker wrote out my options. (Exhibit HH) On December 18, 1983, I agreed to sign the form for disability retirement. (Exhibit II) Mr. Whitaker said that it did not matter whether I was disabled due to an on-job accident or not.

30. I was unable from the time of my return to work until termination to work in a meaningful manner although I tried. Clerical work was impossible for me.

31. Dr. Woodson had stated that I would be returned due to disability on October 7, 1983, two (2) months before. (Exhibit JJ)

32. On January 30, 1984, Mr. Whitaker outlined in writing the

disability figures based on Social Security's presence or absence. (Exhibit KK)

33. I received no reply to the disability application and did the best I could with the constant pain, unable to do any meaningful work.

34. On Jun 21, 1984, Mr. Whitaker offered me the position of clerk at the same building but this time there were no options. He wanted an answer by Monday, June 25, 1984. On the advice of my union representative, I accepted "under protest" because I feared I would be unable to do the job based on my past job efforts. But I was willing to try. (Exhibit LL) Mr. Jason L. Wise, a union representative, attended that meeting and recorded my fear of having no clerical skills. (Exhibit MM) Also, Mr. Whitaker's memorandum is puzzling on that point. (Exhibit NN)

35. It appears that Dr. F. G. Woodson was during June 1984 given information to believe that I was not disabled for work, and could perform clerical work, this information, according to Dr. Woodson, coming from "other Vepco employees". (See Dr. Woodson's report dated June 15, 1984, Exhibit OO) This must be Mr. Whitaker's reference to a personal interview with Dr. Woodson, which Mr. Whitaker mentioned in his memorandum of June 26, 1984. (See Exhibit NN)

I contacted Dr. Woodson by letter of August 11, 1984, indicating he was misinformed by Vepco that I was performing "satisfactorily", when I was complaining of my headaches and consequent inability to do the clerical work. (Exhibit PP)

A year later, on June 26, 1985, Dr. Woodson writes, recalling his report of June 15, 1984, and states

(a) "I did not actually recommend such a position [clerical] .... I have had some reservations about his ability to do the work of a clerk because of this educational background and difficulty working in a job which was relatively inactive physically". (Exhibit RR)

36. After a year of unsatisfactory effort with this pain and being unable to do any meaningful work, I requested, in a letter of June 10, 1985, to be employed as an electric service main first class, and the previous month, May 2, 1985, sought the position of labor foreman.

Despite the pain, I wanted to try. I knew that I could not do the clerical position. (See Exhibits SS and TT) Maybe I could do this.

37. I was eventually fired in September 1985 because I could not perform the clerical position. (Exhibit UU)

38. My pain was and continues unabated and, when my then attorney, Robert M. White, on August 15, 1986, requested an application for disability (See Exhibit VV) the reply of Vepco's K. L. Green, Director-Employee Benefits, was that (a) I was not totally disabled during my employment and (b) that I was fired from Vepco for poor performance, not because of disability. (Exhibit WW)

39. All I tried to do was to work. They called it selective duty. Since I couldn't do it, I was fired. The truth was I could not work at all.

40. Thereafter, I came under the treatment of Dr. E. D. Kay, Jr., a psychiatrist, who treated me and referred me to a Dr. John L. Grant, a neurosurgeon. Dr. Grant states that I have suffered a cerebellar brain stem injury from the accident of July 1981. (Exhibits XX, YY and ZZ) Dr. Kay

believes I am totally disabled due to (a) Post-Traumatic Neurosis, (b) Cervical Nerve Damage Secondary to Trauma and (c) Dysthymic Disorder. (See Exhibits AAA, BBB and DDD)

41. The Social Security Administration determined that I was totally disabled as of Vepco's termination of me in September 1985. That was after a hearing before a Judge. (See Exhibit CCC)

42. I have been totally and permanently disabled since July 1981.

43. On March 29, 1982, at 3:50 p.m. Mr. Ashley said Dr. Dingledine wanted to see me on April 6, 1982. I told him I was scheduled to be in the hospital at the University of Virginia Medical Center. The company never mentioned making another appointment. (See Norman's Diary, page 31, Exhibit EEE)

On October 24, 1983, at 2:40 p.m., Dr. Dingledine came to the trailer where I was. I had approximately a ten (10) minute interview. Dr. Dingledine left. That was the only time I had ever seen him. (See Norman's Diary, page 74, Exhibit FFF)

44. I never received any decision on my request for disability and never received any information regarding the rules for processing my request. That is why, in 1986, I asked Attorney Robert M. White if he would try to get my disability retirement from Vepco.

45. I can't do anything I used to do, I can't work, I can't abide any noise, my house is kept as noiseless as possible, and I can't hunt or fish.

/s/ BRUCE E. NORMAN

STATE OF VIRGINIA,

CITY OF NORFOLK, to-wit:

Executed under oath before me this 11 day of August, 1988.

/s/ Sandra J. Hurd
Notary Public
I was commissioned
Sandra J. McGibbeny

My commission expires:
05/14/89

(2)

FILED
FEB 19 1992
OFFICE OF THE CLERK

No. 91-1232

IN THE
Supreme Court of the United States

October Term, 1991

CYNTHIA M. NORMAN,
Executrix of the Estate of
Bruce E. Norman, Deceased,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a VIRGINIA POWER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS RESTATED

1. Did the Court of Appeals err in affirming the District Court's determination that Virginia Power's Plan administration committees did not abuse their discretion when they concluded that Norman was not eligible for benefits under the Plan?

2. Should this Court modify its holding in *Firestone Tire & Rubber Co. v. Bruch* and adopt a rule that where some members of a plan administration committee conduct an initial review of the evidence relevant to a benefit determination and make a recommendation to the other members, the Courts must review the benefit determination *de novo*?

STATEMENT REQUIRED BY RULE 29.1

1. Respondent Virginia Electric and Power Company's parent company is Dominion Resources, Inc.

2. Respondent Virginia Electric and Power Company has no non-wholly-owned subsidiary.

TABLE OF CONTENTS

Questions Restated i

Statement Required by Rule 29.1 ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 2

I. Factual Statement 2

A. Benefit Determination 2

B. Basis for Benefit Determination 4

II. Decisions of the Lower Courts 7

Reasons for Denying the Writ 9

I. The Appeals Court Did Not Err in Holding There Was No Abuse of Discretion By the Plan Administrator 9

II. This Court Need Not and Should Not Modify Its Holding in *Firestone Tire & Rubber Co. v. Bruch* 11

Conclusion 13

TABLE OF AUTHORITIES

CASE

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) . . . . . i, 2, 7, 9, 11, 12, 13

STATUTE

Employee Retirement Income Security
Act of 1974 (ERISA) § 502(a)(1)(B),
29 U.S.C. § 1132(a)(1)(B) 4, 9, 11, 12, 13

OTHER AUTHORITIES

Supreme Court Rule 10.1 . . . . . 1, 13

No. 91-1232

IN THE

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October Term, 1991

CYNTHIA M. NORMAN,
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Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a VIRGINIA POWER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

This case does not present any issue appropriate for review by this Court. There are no "special and important reasons" for granting the writ as required by Supreme Court Rule 10.1. The lower courts' decisions do not raise any novel issues, are not in conflict with any decisions of this Court, and do not raise a conflict among the Courts of

different Circuits. The decisions are amply supported by the factual record and the applicable case law. This Court need not and should not modify its holding announced two years ago in *Firestone Tire & Rubber Co. v. Bruch*. Virginia Electric and Power Company ("Virginia Power") respectfully requests that the Petition for Certiorari filed by Cynthia M. Norman be denied.[1/]

STATEMENT OF THE CASE

I. Factual Statement

A. Benefit Determination

On December 10, 1988, Bruce Norman ("Norman"), a former employee of Virginia Power, applied for a Total and Permanent Disability Allowance under the Dominion Resources, Inc. Retirement Plan ("the Plan"). For a Virginia Power employee to qualify for such benefits, the employee must be (a) eligible by age or years of service; (b) totally disabled; (c) permanently disabled; (d) due to a bodily injury or disease; (e) while employed by Virginia Power.

The Plan provides that the determination as to whether a participant is totally and permanently disabled is to be made "on the basis of medical evidence satisfactory to a physician designated by the Administrator." Accordingly, two physicians, Dale E. Slagel, M.D., and William S. Dingledine, M.D., reviewed the two volumes of medical information relevant to Norman's claim. These volumes, containing over 600 pages, included all the documents

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[1/] Virginia Power concurs in Petitioner's description of the parties, report of the opinions and judgments below, statement of jurisdiction, and statement of the statute involved.

Norman's lawyer submitted for consideration with the claim; dozens of examination reports and test result reports from Norman's numerous examining and treating physicians; and bi-weekly reports from Norman's treating physician certifying as of every two weeks throughout the last 28 months of Norman's employment that Norman was able to return to work.

Dr. Slagel and Dr. Dingledine prepared written reports setting forth their analysis of the medical information and their recommendation that Norman's claim be denied because he had not been totally and permanently disabled due to bodily injury or disease while employed by Virginia Power. Dr. Slagel and Dr. Dingledine were members of Virginia Power's Disability Benefit Committee ("DBC"). The other four members of the DBC also reviewed the two volumes of medical information, along with the reports from Dr. Slagel and Dr. Dingledine. The DBC then met to consider Norman's claim. At this meeting, Dr. Slagel and Dr. Dingledine explained their conclusions and answered the Committee's questions. The DBC then unanimously voted that Norman was not entitled to the benefits because he had not been totally and permanently disabled due to bodily injury or disease while employed by Virginia Power.

Norman's lawyer appealed the DBC's determination to Virginia Power's Administrative Benefit Committee ("ABC") and submitted additional documents for the ABC to consider. The ABC reviewed those documents, along with the two volumes of medical information and the documents relating to the processing of Norman's claim, then met to consider the appeal. Dr. Slagel and Dr. Dingledine were not members of the ABC. They attended the ABC meeting to answer the Committee's questions, then left the meeting before the ABC voted on the appeal. The ABC concluded

that the DBC had correctly decided that Norman was not eligible for the benefits.

Norman then instituted this action under Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), alleging that he was wrongfully denied benefits under the Plan.

B. Basis for Benefit Determination

As noted above, for Norman to be eligible for the benefits he sought, the medical information had to show that he had been totally and permanently disabled due to bodily injury or disease while employed by Virginia Power. The medical information revealed the following facts.

On July 8, 1981, Norman reported that in the course of his work as a boiler operator for Virginia Power, he had been struck on the back of his neck by a rubber air hose. He was treated the following day by a doctor who diagnosed a cervical strain and authorized him to return to regular duty work on July 11, 1981.

When Norman continued to complain of headaches, nausea, and a ringing or buzzing sound, he was sent to a succession of doctors. Between July 1981 and December 1982, he was examined, tested and treated by numerous doctors in an array of specialties including neurology, otolaryngology, psychiatry, radiology, and neurosurgery. The doctors employed a wide range of diagnostic technologies, including sophisticated imaging techniques, psychological testing, and chemical testing. The results of all this testing and examination were remarkably consistent: Norman did not have any physical problems and was not totally disabled from performing job duties. To the extent

he exhibited problems, the problems were best termed a personality disorder or character disorder. Such disorders are not totally disabling and do not constitute bodily injuries or diseases. In general, a person with a character disorder is not unable, but is unwilling to satisfy expectations. Some of the doctors noted that Norman was deliberately deceptive in describing his circumstances, was highly manipulative, and appeared to be primarily motivated by a desire to obtain compensation.

In January 1983, Norman began seeing Dr. Frederick Woodson, a psychiatrist, who remained his treating physician through September 1985. During this period, Dr. Woodson saw and treated Norman every two weeks. Dr. Woodson provided certification after each appointment that Norman was able to continue working as long as he was in a low-noise environment. Dr. Woodson also concluded that Norman had a personality disorder, and he explicitly stated in his reports that Norman was not disabled from performing work, particularly clerical work. Dr. Woodson also stated after three years of treating him that Norman was not reliable in providing information and that his interest was not in a remedy, but in obtaining retirement.

Due to Norman's claimed sensitivity to noise, after July 1981 the doctors specified that Norman be assigned to work in a low-noise area. The doctors certified that with the noise limitation, Norman was able to work. Accordingly, Norman was assigned to perform clerical work in an administrative office, a low-noise area. Norman's work performance as a clerical was acceptable during the period he received his former rate of pay. On June 25, 1984, Norman's position was formally changed to clerk, with a lower pay rate than he had been receiving. Norman protested the reduction in pay and from that time through

September 1985, his work performance as a clerk was unacceptable. He was discharged on September 16, 1985, for poor performance.

Five months after his discharge, Norman went for the first time to see Dr. Daniel Kay, a psychiatrist to whom his lawyer had referred him. Dr. Kay concluded that Norman had "suffered significant deterioration" since his discharge in September 1985, yet Dr. Kay did not conclude even at that point that Norman was totally and permanently disabled. Dr. Kay acknowledged that he could not determine whether Norman had been disabled during the time of his employment with Virginia Power.

In March 1988, two and one-half years after the end of Norman's employment with Virginia Power, Dr. Kay referred Norman to Dr. John Grant, a neurosurgeon. Dr. Grant stated that it was his "impression" that Norman had experienced an injury to his brain stem. He based that conclusion solely on his observations of Norman's behavior in March 1988 and on Norman's account of his history. Norman did not provide Dr. Grant any of the volumes of medical testing and reports relating to his condition, and Dr. Grant's own tests did not reveal any physical abnormality. Like Dr. Kay, Dr. Grant acknowledged that he could not state whether Norman had been disabled during the time of his employment with Virginia Power or at any other time before 1988. Dr. Grant stated, "I have no idea what his condition was in 1985. I'd have to examine him in 1985."

The DBC and the ABC found the information from Dr. Kay and Dr. Grant of very little value in determining whether Norman had been disabled during the time of his employment with Virginia Power, the time relevant to the

benefit determination.[2] Viewing the medical information as a whole, the DBC and the ABC concluded that Norman was not totally and permanently disabled due to bodily injury or disease while employed by Virginia Power.

II. Decisions of the Lower Courts

Norman filed this action in the United States District Court for the Eastern District of Virginia, Norfolk Division. While the case was in the District Court, Bruce Norman died and Cynthia M. Norman, as Executrix of his estate, was substituted as Plaintiff. In the interest of simplicity, this Brief uses the term "Norman" to refer to either Bruce E. Norman taking actions before his death or Cynthia M. Norman acting on his behalf after his death.

The parties submitted the case to the District Court on cross-motions for summary judgment and provided the District Court the entire set of medical records which had been considered by the Plan administration committees. On December 6, 1990, the District Court issued its decision holding that Virginia Power did not abuse its discretion in determining that Norman was not eligible for total and permanent disability benefits.

Applying *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the District Court examined the Plan and determined that it conferred discretion on the Plan administration committees, such that the abuse of discretion

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[2] The Social Security benefit determination also was of limited value because it applied a different definition of "disability" from that in the Plan, among other reasons. *See* Appendix to Petitioner's Brief (cited as "App.") at 1M-34M. Petitioner's Brief is inaccurate in stating that the Social Security Judge found Norman to be "totally disabled." *See id.*

standard should apply. (App. 13C-14C). Norman has never disputed that the Plan confers such discretion.[3] Norman argued, however, that the Court should apply a different standard because Virginia Power's doctors allegedly were acting under a conflict of interest. The District Court reviewed the evidence and concluded, "the Court sees no problem as to any conflict of interest." (App. 25C). Moreover, the District Court did not agree with a Louisiana District Court decision applying a higher standard of review when the employer relied on the opinion of a doctor the employer had chosen. (App. 25C-26C). Nonetheless, the District Court gave Norman the benefit of such a "modified heightened inquiry." (*Id.*). The District Court found that the decisions of the DBC and the ABC survived even that heightened scrutiny. (App. 26C-33C).

On August 19, 1991, a unanimous panel of the Court of Appeals for the Fourth Circuit adopted the District Court's opinion and affirmed the decision that Virginia Power did not abuse its discretion when it denied Norman benefits. (App. 14B). While giving Norman the full benefit of his argument that the two Company-appointed physicians were subject to conflicts of interest, the Court of Appeals stated, "there was an overwhelming amount of medical evidence from when Norman was employed by VEPCO showing that his treating physicians then did not believe that his 1981 accident caused total and permanent disability." (*Id.*). Thus, the Court concluded that Virginia Power did not abuse its discretion in denying the benefits. (*Id.*).

Norman filed a petition for rehearing with suggestion for rehearing en banc. No member of the Court of Appeals requested a poll on the suggestion for rehearing en banc, and

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[3] *See* Court of Appeals decision at App. 13B.

the petition was denied on October 22, 1991. (App. 1A). This Petition followed.

REASONS FOR DENYING THE WRIT

I. The Appeals Court Did Not Err in Holding There Was No Abuse of Discretion By the Plan Administrator.

Norman contends that the Court of Appeals should have reversed the District Court's judgment because, he argues, the two physician members of the Disability Benefit Committee had a conflict of interest.

It must be noted at the outset that this contention does not raise an issue worthy of this Court's discretionary review on a writ of certiorari. The lower courts routinely review benefit determinations under ERISA, applying either the abuse of discretion standard or *de novo* review, as this Court specified in *Firestone Tire & Rubber Co. v. Bruch*. In this case, the District Court and the Court of Appeals merely undertook this routine review, examining the medical evidence and the Plan administration procedures in issue. Nothing in their approach or analysis conflicted with the decisions of the other Courts of Appeal or this Court. Norman has not even attempted to cite any decisions with which the Fourth Circuit's decision might conflict.

Even if the issue were worthy of this Court's review, the facts relevant to the issue would not justify granting the petition. Both of the lower courts fully considered Norman's conflict of interest contention and gave him the benefit of a heightened level of scrutiny, even though the evidence did not show a conflict of interest. They found, however, that even if they assumed a conflict of interest on the part of two

of the six members of the DBC, that did not render the decisions of the DBC and the ABC an abuse of discretion. The medical evidence overwhelmingly supported the conclusion that Norman had not been totally and permanently disabled during the time of his employment with Virginia Power.

As is explained in the next section of this Brief, Virginia Power disputes Norman's assertion that the doctors were subject to a conflict of interest. Even if Norman were correct in that assertion, however, there would still be no merit to his argument that it was illogical for the Court of Appeals to find a conflict, yet find no abuse of discretion. Norman argues that there was a conflict of interest because the other members of the DBC acted on the recommendation of the two physician members. He made this argument to the lower courts, and both the District Court and the Court of Appeals accepted the premise that they should apply a heightened inquiry to the DBC's deliberations. Those Courts concluded, however, that even if those deliberations were viewed with suspicion, the weight of the medical evidence overcame this suspicion. There is nothing logically inconsistent in the lower courts' approach or in their conclusion. Moreover, the record amply supports their conclusion.

Finally, it bears underscoring that even if the Court of Appeals had been logically inconsistent in reviewing and weighing the evidence, that would not justify an exercise of this Court's discretionary jurisdiction on certiorari. The Court of Appeals considered the significance of the doctors' membership on the DBC and gave that circumstance the weight the Court found appropriate. This Court should not devote its discretionary docket to a review of that kind of routine decision as to the weight of evidence.

II. This Court Need Not and Should Not Modify Its Holding in *Firestone Tire & Rubber Co. v. Bruch.*

Norman also contends that the Court should modify its holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and adopt a new rule. There is no need for such a modification. *Bruch* already adequately provides for cases such as this one. The Court need not and should not modify *Bruch* as Norman urges.

As was explained in the previous section of this Brief, Norman contends that the DBC decision was tainted by conflict of interest because the other DBC members were acting on the recommendation of the physician members. Norman urges that in such circumstances, the Courts should review the benefit determination *de novo*.

In *Firestone Tire & Rubber Co. v. Bruch*, this Court expressly rejected the argument that the proper standard of review depends on the absence or presence of a conflict of interest:

> Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, see 828 F.2d, at 143-146, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under § 1132(a)(1)(B), the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator is operating under a possible or actual conflict of interest. Of course, if a

> benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion."

489 U.S. at 115 (citation omitted).

Norman has not provided any justification, either general or particular, for modifying this approach. He is merely dissatisfied with the outcome when the approach was applied to this case.

The facts of this case particularly fail to justify changing the *Bruch* approach. There is absolutely nothing improper about having certain members of a benefit administration committee conduct an initial review of the evidence relevant to a benefit determination and make a recommendation to the other members. That practice does not create a conflict of interest and does not violate ERISA.[4/] Indeed, under ERISA, there is no reason the DBC could not have been composed *solely* of the two physician members. But to the extent such a recommendation causes a reviewing court any concern about the fairness of the process, the court can and should simply take that factor into consideration, along with all the other relevant factors, in determining whether there was an abuse of discretion. That is precisely what the lower courts did in this case, and this approach gave the appropriate weight to the purported conflict of interest.

[4/] In addition, there is no conflict of interest or ERISA violation merely because the employer compensates the physicians for their work in reviewing the medical information. It is difficult to imagine how an employer could obtain such expert help without providing compensation.

The *Bruch* decision's delineation of when to apply an abuse of discretion standard and when to review *de novo* was based on a careful analysis of ERISA and the trust law underlying ERISA. Nothing in that law supports the kind of modification Norman proposes. The Court need not re-examine that law and modify its decision rendered only two years ago.

CONCLUSION

Norman's petition fails to satisfy the standard established in Supreme Court Rule 10.1 as to when this Court will exercise its discretion to grant a writ of certiorari. The decisions of the lower courts were proper and do not raise any issue which justifies this Court's review. The petition should be denied.

Respectfully submitted,

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